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No. 00-

IN THE

Supreme Court of the United States

SAMUEL D. MOORE, *et al.*,

Petitioners,

v.

AFTRA HEALTH AND RETIREMENT FUNDS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under ERISA, participants and beneficiaries of an ERISA-governed Plan have standing to bring a derivative claim for delinquent contributions pursuant to ERISA sections 502(g)(2) and 515, when the Trustees of the Plan, in breach of their fiduciary duties, have failed to do so?

2. Should mandatory class treatment be afforded to claims for breach of fiduciary duty against the plan Trustees asserted under ERISA section 502(a)(2), where the representative plaintiffs and each class member assert identical claims, i.e., the claims of the plan, and seek to recover identical damages, i.e., the damages suffered by the plan?

3. In light of this Court's decision in *Varity Corp. v Howe*, that ERISA section 502(a)(3) is a "catchall" provision providing appropriate equitable relief to redress injuries that section 502 does not elsewhere adequately remedy, should the courts below have dismissed petitioners' claim against the Record Company Defendants under section 502(a)(3), while also holding that petitioners had no other remedies under any other provision of section 502 against the Record Company Defendants?

4. In a civil RICO case predicated on mail fraud, where petitioners were the target of and directly injured by the fraudulent scheme, must they also show that they directly received and relied on the mailings made in furtherance of the scheme?

LIST OF PARTIES

Petitioners:

SAMUEL D. MOORE; CURTIS MAYFIELD; JERRY BUTLER; CARL GARDNER; BRIAN HYLAND; JERRY LANDERS, as administrator on behalf of the ESTATE OF JACKIE WILSON, Deceased; DAVID PRATER, Jr., on behalf of DAVE PRATER, JR.; DORIS JACKSON; MARSHALL THOMPSON; CECIL WOMACK, JR., as named beneficiary of Mary Wells; LESTER CHAMBERS; WILLIE B. PINKNEY; BARBARA ACKLIN; ALFRED SMITH, professionally known as BRENTON WOOD; and OTIS R. HARRIS, JR., a/k/a DAMON HARRIS; for themselves, and for all others similarly situated.

Respondents:

AFTRA HEALTH AND RETIREMENT FUNDS; JOHN BIRD; JOHN CONNOLLY; J. NICHOLAS COUNTER III, DENNY DELK; REED FARRELL; DEAN FARRIS; JOHN FITZGERALD; CECIL R. FORSTER, JR.; BILL HILLMAN; DAY KROKIK, III; LYNNE LAMBERT; FRANK MAXWELL; JOHN MORAN; MARION PRESTON; GENE RAYBURN; NORMAN SAMNICK; SUSAN SAVAGE; JAMES F. SIRMONS; SALLY STEVENS; BRUCE YORK; SONY MUSIC ENTERTAINMENT GROUP, and its divisions Columbia Records, Epic Records and Sony Music Distribution; WARNER MUSIC GROUP, INC.; WARNER BROS. RECORDS, INC.; RHINO ENTERTAINMENT COMPANY, d/b/a Rhino Records, Atlantic Recording Corporation, Warner Special Products, Inc., Warner-Elektra-Atlantic Corporation; A&M RECORDS, INC., on its behalf and as assignee and successor to Mercury Recording Productions, Inc., Motown Records, Inc. and Twentieth Century Fox Records, Inc.; BERTELSMANN MUSIC GROUP, INC.; BRUNSWICK RECORDS, INC.; CAPITOL RECORDS, INC., on its own behalf and as assignee and

successor to EMI Records USA, Inc., United Artists Records, Inc. and CEMA Distribution; MCA RECORDS, INC., on its own behalf and as assignee and successor of Decca Records, Inc., ABC Paramount Records, Inc., and ABC-Dunhill Records, Inc.; MOTOWN RECORDS COMPANY, L.P., as successor and assignee of Motown Records, Inc.; POLYGRAM RECORDS, INC., on its behalf and as assignee and successor to Twentieth Century Fox Records, Inc. and Motown Records, Inc.; BRUNSWICK RECORDS, INC.; GUSTO RECORDS, INC.; ORIGINAL SOUND RECORD COMPANY, INC.; VEE-JAY INTERNATIONAL, INC.; FANTASY, INC.; and JOHN DOES 1-50.

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STATEMENT OF JURISDICTION

The judgment of the Court of Appeals affirming the district court was entered on June 29, 2000. (App. A at 27a). The Order denying Plaintiffs' Petition for Rehearing and Rehearing En Banc was entered on January 5, 2001. (App. E at 53a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

ERISA sections 502(a)(1), (2) and (3), 29 U.S.C. §§ 1132(a)(1), (2) and (3):

(a) Persons empowered to bring a civil action

A civil action may be brought —

(1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

ERISA section 502(b)(2), 29 U.S.C. § 1132(b)(2):

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

ERISA section 502(g), 29 U.S.C. § 1132(g):

(g) Attorney's fees and costs; awards in actions involving delinquent contributions.

1. In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

2. In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan —

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of —

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

ERISA section 515, 29 U.S.C. § 1145:

§ 1145. Delinquent contributions

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

RICO section 1962(c), 18 U.S.C. § 1962(c):

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the costs of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

STATEMENT OF THE CASE

A. Procedural History

1. Proceedings Relevant to Dismissal of ERISA claims Against the Record Company Defendants.

This is a putative class action brought by vocal performing artists against their union-sponsored health and retirement funds ("Funds"), the Trustees of these Funds, and the Record Companies that were obligated by a collective bargaining agreement and by ERISA to make contributions to the Funds

on the artists behalf ("The Record Company Defendants"). The gravamen of the action is that the Record Company Defendants failed to make accurate and timely reports of plaintiffs' earnings to the funds, failed to make the required contributions, and that the Trustees, in breach of their fiduciary duties, allowed the Record Company Defendants to avoid their contractual and statutory obligations.

The Second Amended Complaint (Complaint) was filed in November of 1996. Six of the claims therein asserted are pertinent to this petition: a derivative delinquent contribution claim pursuant to ERISA sections 502(g)(2) and 515, 29 U.S.C. §§ 1132(g)(2) and 1145 (Count One) and a claim for equitable relief pursuant to ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3) (Count Four) both against the Record Company Defendants; a RICO claim against the Record Company Defendants, pursuant to RICO § 1962(c) (Count Seven); and three claims against the Funds Trustees for breach of fiduciary duty pursuant to ERISA section 502(a)(2) (Counts Two, Five and Six).

On August 14, 1997, the district court granted the Record Company Defendants' motion to dismiss the two ERISA claims asserted against them. In dismissing the derivative delinquent contributions claim asserted in Count One, the district court ruled that the "derivative action plaintiffs seek to incorporate was expressly addressed and rejected in [*Useden v. Acker*]." App. D at 44a. Its dismissal of the claim for equitable relief asserted in Count Four was based on the conclusion that the relief petitioners sought was legal not equitable, and that since "Congress has provided plaintiffs with an appropriate remedy, further equitable relief is not mandated." App. D at 46a. Petitioners' motion under Rule 54(b) for entry of final judgment on the order dismissing the ERISA claims was granted by the district court, and a timely appeal to the Eleventh Circuit followed. App. B at 32a.

The Eleventh Circuit affirmed the district court's dismissal of the ERISA claims asserted against the Record Company

Defendants. Noting that its decision was one of first impression within the Circuit and that it conflicted with decisions of the Second and Third Circuits, the Eleventh Circuit ruled that petitioners lacked standing to pursue a derivative suit for delinquent contributions pursuant to ERISA section 1145(g)(2), when the Trustees, in breach of their fiduciary duties fail to bring such a suit. App. A at 14a-24a.

The Eleventh Circuit also affirmed the district court's dismissal of Count Four, but on grounds different than those on which the district court relied. It ruled that Count Four failed to state a claim for relief because it failed to allege "within the four corners of that count that the Record Company Defendants violated a substantive provision of ERISA or the terms of the [plan]." App. A at 25a.

2. Proceedings Relevant to the Denial of Class Certification.

Petitioners moved for class certification of their three breach of fiduciary duty claims brought against the Funds Trustees under section 502(a)(2) of ERISA. (Counts Two, Five and Six) Petitioners sought mandatory class treatment for these claims under Rule 23(b)(1) and 23(b)(2) of the Federal Rules of Civil Procedure because, as required by ERISA section 502(a)(2), the claims were brought by petitioners "on behalf of the plan" and sought recovery "to the plan." 29 U.S.C. § 1132(a)(2). Petitioners also moved for class certification of the RICO claim against the Record Company Defendants under Rule 23(b)(3) of the Federal Rules of Civil Procedure.

The district court denied petitioners' motion for class certification of the three breach of fiduciary claims asserted on behalf of the Funds concluding that the claims would require "individualized proof" similar to that required to prove the plaintiffs' individual benefits claims. App. C at 36a. It also denied petitioners' motion for class certification of the RICO claim on "typicality" and "predominance" grounds, ruling that under the Eleventh Circuit's decision in *Pelletier v. Zweifel*,

921 F.2d 1465 (11th Cir. 1991) "to establish mail fraud, each class member will have to show reliance on defendant's alleged fraudulent conduct." App. C at 38a.

Petitioners' motion to amend the class certification order to include the statement prescribed by 28 U.S.C. § 1292(b), so as to permit an immediate appeal of that Order was granted on June 22, 1998, (App. B at 32a), and Petitioners' Petition for Permission to take an Interlocutory Appeal filed in the Eleventh Circuit was granted on October 6, 1998. The class certification appeal was thereafter consolidated with the appeal of the dismissal of the ERISA claims.

The Eleventh Circuit affirmed the district court's denial of class certification of all claims. This decision was based on its conclusion that the district court would have to look at each singer's royalty contract in order to make a separate assessment for each singer as to whether the proper amount of gross compensation was reported and collected as to him or her. App. A at 10a. For this reason, it ruled that the district court did not abuse its discretion in denying class certification.

B. Material Facts

The respondents' liability in this case emanates from the National Code of Fair Practice for Phonographic Recordings (the "Phono Code"), which is a collective bargaining agreement between the AFTRA Union and the Record Company Defendants. The Phono Code, which was originally signed in 1959 requires the Record Company Defendants to make payments to the AFTRA Funds on behalf of each vocal performer working under the Phono Code. The gravamen of this action is that despite the requirements of the Phono Code and ERISA, the Record Company Defendants have systematically and intentionally failed to report the correct earnings of the artists working under the Code and to make accurate and timely contributions to the Funds on their behalf. The Complaint also alleges that the Funds and its Trustees, in breach of their fiduciary duties under ERISA, failed to enforce

the obligations of the Phono Code against the Record Company Defendants, and failed to ensure that petitioners and the class received the benefits to which they were entitled.

Pursuant to paragraph 34 of the Phono Code, contributions to the Funds must be calculated on the basis of the "gross compensation" of the artist up to a specified cap per year. The term "gross compensation" is specifically defined in the Code:

> **The term "gross compensation" as used hereinabove includes but is not limited to all forms of payment of any kind or nature whatsoever (but without any recoupment, deductions, set-offs, etc. except as otherwise specifically provided herein)**, including salaries, earnings, royalties, fees, advances, guarantees, deferred compensation, proceeds, bonuses, profit-participation, shares of stock, bonds, options and property of any kind or nature whatsoever paid to the artist directly or indirectly or to any other person, firm, entity or corporation on his behalf, and/or whether paid during the term of this Code or the artist's individual agreement with the Company regardless of the continued existence of this or successor Code.

An understanding of this definition requires an understanding of the basic compensation system in the record industry. That system is based on a structure whereby the costs that the record company incurs in making a recording, are "charged to" (i.e., recouped from) the artist and deducted from his royalty payments. Notwithstanding this fact however, the Phono Code requires "*gross* compensation" to be reported to the Funds; that is, all earnings *prior to* deductions for recording costs and other costs.[1]

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1. In December of 1995 the PhonoCode was amended to remove the term "gross compensation" as the basis for payment.

In the district court, plaintiffs presented evidence[2] that despite the terms of the Phono Code and the requirements of federal law, the Record Company Defendants have for years engaged in the systematic practice of under-reporting gross compensation and underpaying the contributions owed to the Funds. Among other things, the record companies reported "net compensation" to the Funds, i.e. they reported payments to the artists *reduced by* recording costs and other charges to the royalty accounts. No record company *ever* reported as gross compensation to the Funds the royalty earnings by an artist in an unrecouped royalty position (i.e., those with royalty earnings but no payments). Relying on this "interpretation dispute" and many others, the Record Company Defendants reported a fraction of the gross compensation earned by the class to the Funds. Indeed, by the time this suit was filed, delinquencies under the Phono Code had reached nearly $40 million, while voluntary remittances were less than $5 million per year.

Beginning in around 1970, the Funds conducted biennial "compliance audits" of the Record Company Defendants. Accordingly, the auditors reviewed and assessed the covered earnings of each Phono Code artist, compared their findings with the reports of earnings made by the record companies, and submitted a claim for the difference to each Record Company Defendant. With minor exception all of the major record companies were audited every other year. The audit claims were made on an *aggregate* basis, but included a schedule identifying each artist and the respective amount claimed. The auditors, following instructions from the Funds' staff, included within their audit claims royalties earned, but not paid to the artists, because the recording costs incurred by the record company had not yet been "recouped" by the company. In other words, the auditors made claims for "gross compensation" not

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2. The district court denied the Record Company Defendants' Motion for Summary Judgment on the RICO claim ruling that "there is evidence from which a jury could infer a scheme to defraud the funds, plaintiffs or both." App. A at 49a.

net compensation. The audits however, were *always* settled in favor of the record company's interpretation that only "net compensation" had to be reported. Either no interest or minimal interest (1% or 2% per year) was collected, even though audits remained outstanding for as long as ten years.

The derivative delinquent contribution claim against the Record Company Defendants (Count One) and the breach of fiduciary duty claims against the Funds Trustees (Counts Two, Five and Six) have in common that they seek to recover *to the Funds* the amount of money lost *by the Funds* on account of respondents' wrongful conduct. Under the delinquent contributions claim, the lost money would come from the Record Company Defendants; under the breach of fiduciary duty claims — from the Funds Trustees. The evidence to establish liability and damages on both claims arises from the Funds audit claims and the Trustees' settlement of them. Individual inquiry into the situation of particular artists is not required.

The decisions of the courts below foreclose all avenues of relief available under ERISA to remedy the Plan injury established by the evidence in this case. The Court of Appeals has ruled that petitioners may not step in the shoes of the Funds' Trustees to pursue the contributions they left on the table when the Trustees wrongfully settled their own audit claims. The alternative route to collection of these Plan damages — i.e. collection of the lost monies directly from the Trustees under section 502(a)(2), was cut-off by the court's denial of class action treatment of these claims. Even equitable relief on behalf of the Plan was denied by the dismissal of petitioners' claim under 502(a)(3) for a "pleading error" not raised by either defendants or the district court.

ARGUMENT

A. THIS PETITION SHOULD BE GRANTED TO RESOLVE A CONFLICT IN THE CIRCUITS ON THE IMPORTANT ISSUE OF WHETHER, UNDER ERISA, PARTICIPANTS AND BENEFICIARIES HAVE STANDING TO BRING A DERIVATIVE CLAIM FOR DELINQUENT CONTRIBUTIONS PURSUANT TO ERISA SECTIONS 502(g)(2) AND 515.

1. The Eleventh Circuit's Decision is Inconsistent with Decisions of the Second and Third Circuit.

The Eleventh Circuit ruled that participants and beneficiaries have no standing to prosecute a derivative claim for delinquent contributions pursuant to ERISA sections 502(g)(2) and 515. This decision, as the Eleventh Circuit itself recognized, was a question of first impression in the Circuit and conflicts with the decisions of the Second and Third Circuits. App. A at 14a, 16a. The Second and Third Circuits both ruled that participants and beneficiaries of an ERISA-governed plan have standing to pursue derivatively, on behalf of the plan, a suit for recovery of delinquent contributions when the trustees, in breach of their fiduciary duties to the plan, have failed to do so. *See Diduck v. Kaszycki and Sons Contractors, Inc.*, 874 F.2d 912, 916 (2d Cir. 1989); *McMahon v. McDowell*, 794 F.2d 100, 109 (3d Cir. 1986); *Strubel v. New Jersey Brewery Employees Welfare Trust Fund*, 732 F.2d 325, 336-37 (3d Cir. 1984). This petition ought to be granted to resolve this important issue.

2. Under ERISA, Plaintiffs Can Maintain a Derivative Action on Behalf of the Funds in Which They Are Participants and Beneficiaries to Collect Delinquent Contributions Owed to the Funds, When the Trustees, in Breach of Their Fiduciary Duties, Have Failed to Do So.

In Count One of the Complaint, petitioners asserted a derivative claim on behalf of the Funds pursuant to sections 502(g)(2) and 515 of ERISA, 29 U.S.C. §§ 1145 and 1132(g)(2)

for recovery of delinquent contributions against the Record Company Defendants. Section 515 of ERISA codifies the Record Company Defendants' obligation to make contributions to the Funds, as required by the Phono Code:

> Every employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

29 U.S.C. § 1145. Section 502(g)(2) creates an explicit cause of action to enforce the employers' contribution obligations under section 515 of ERISA. This section provides in pertinent part as follows:

> (2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded the court shall award the plan —
>
> (A) the unpaid contributions,
>
> (B) interest on the unpaid contributions,
>
> (C) an amount equal to the greater of —
>
> (i) interest on the unpaid contributions, or
>
> (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),
>
> (D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and
>
> (E) such other legal or equitable relief as the court deems appropriate.

29 U.S.C. § 1132(g)(2).

As shown above, both the substantive right and the legal remedy have been explicitly conferred in the statute. Because here the Trustees have wrongfully failed to utilize the remedy *explicitly conferred* by section 502(g)(2), to enforce the right *explicitly conferred* by section 515, petitioners invoke the procedural device of a derivative action to assert the claim.

Only the Third Circuit and Second Circuit have considered this issue. Both ruled that pursuant to 29 U.S.C. §§ 1145 and 1132(g)(2), a plaintiff may sue derivatively on behalf of the Funds to recover delinquent contributions owing to the Funds, so long as plaintiff establishes that the Trustees, in breach of their fiduciary duties, have failed to do so. *Diduck*, 874 F.2d 912 916 (2d Cir. 1989); *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 336-38 (3d Cir. 1984). The ability of the beneficiary to sue derivatively on behalf of the plan emanates from a principle of trust law which provides:

> if the trustee holds in trust a contract right against a third person and the trustee improperly refuses to bring an action to enforce the contract the beneficiaries can maintain a suit in equity against the trustee joining the obligor as a co-defendant.

Struble, 732 F.2d at 337 (*quoting*, A. Scott, 4 *Law of Trusts* § 282. 1 (3d ed.1967)).

Nothing in the language of the statute or the case law interpreting it compels the conclusion that derivative enforcement of a right *expressly conferred* under ERISA is not permitted. In *Mertens v. Hewitt Associates*, 508 U.S. 248, 254-56 (1993), this Court warned against expanding ERISA to create claims or to reach parties that were not within reach or contemplation of the statute. The derivative action that petitioners seek to enforce is consistent with this Court's cautionary language in *Mertens*, as it merely asserts an *existing statutory right* against a party clearly liable under the statute.

In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108-109 (1989), this Court, while characterizing ERISA as a "comprehensive and reticulated statute," in fact recognized that *procedural devices and principles* developed under trust law may be appropriately used to fill the gaps in the statute. Building on that foundation, the Eleventh Circuit in *Useden v. Acker*, 947 F.2d 1563, 1581-82 (11th Cir. 1989) recognized that *Firestone* "authorized the development of a federal common law under ERISA drawing upon the traditional law of trusts," and "recognized that the federal courts may be authorized in certain areas to borrow procedural devices and principles from trust law." This is just such an area.

The language of the statute is not inconsistent with derivative enforcement of the employers' contribution obligation. While section 502(g)(2) specifically authorizes collection actions "by a fiduciary for or on behalf of a plan to enforce section [515]," it elsewhere prohibits *only the secretary* from bringing such suits. Specifically, in section 502(b), the statute provides: "The secretary shall not initiate an action to enforce section 1145[515] of this title." If the language of section 502(g)(2) authorizing suit "by a fiduciary for or on behalf of a plan" was meant to exclude all persons *other than fiduciaries* from bringing such actions, then section 502(b), specifically prohibiting only the *secretary* from bringing such suits, would be entirely superfluous. *See United States v. Canals-Jimenez*, 943 F.2d 1284, 1287 (11th Cir. 1991) ("a statute is to be interpreted so that no words shall be discarded as being meaningless, redundant, or mere surplusage").

The statute does not address the availability of a derivative action to enforce the rights conferred by the statute. This is not surprising. Federal statutes rarely address this issue, yet derivative enforcement is often permitted. *See, e.g., Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla.*, 140 F.3d 898, 906-907 (11th Cir. 1998) (shareholders of corporation have standing to bring derivative action on behalf of corporation

under RICO if racketeering activity that forms the basis of the RICO claim was directed at the corporation).

In sum, nothing within the language of the statute compels the Eleventh Circuit's conclusion that derivative enforcement of rights conferred by ERISA, a procedural device often used in the trust law arena from which ERISA borrows so heavily, should not be permitted.

Nor do policy concerns dictate against the allowance of this remedy. Policy concerns lead both the Second Circuit and the Third Circuit to conclude that a derivative suit for the recovery of delinquent contributions should be permitted to proceed only where the plaintiffs prove that the Trustees breached their fiduciary duty by failing to collect the delinquent contributions themselves. *See, e.g., Molina v. Mallah Org., Inc.*, 804 F. Supp. 504, 509 (S.D.N.Y. 1992); *Struble v. N.J. Brewery Emp. Welfare Trust Fund*, 732 F.2d 325, 336-337 (3d Cir. 1984). In this suit, petitioners have brought a claim for fiduciary breach under section 502(a)(2) which asserts the requisite claim: that the Trustees breached their fiduciary duty by not pursuing and collecting delinquent contributions. Should petitioners fail to establish fiduciary breach under section 502(a)(2), the derivative suit would fail as well. Should petitioners succeed, however, and establish the wrongfulness of the Trustees' actions, the court can order payment of the delinquent contributions to the Funds directly from the parties that owe them — the Record Company Defendants. This result would be far less disruptive to the administration of employee benefit plans than the procedure that the Record Company Defendants urged below — payment of the amount of the delinquencies by the Trustees (who may or may not have it), with a potential claim over by the Trustees against the Record Company Defendants.

3. The Eleventh Circuit's Statement that a Claim Under Section 502(a)(2) Provides a Remedy to Participants and Beneficiaries Injured by The Trustees' Failure to Collect Delinquent Contributions is Inconsistent with its Refusal to Permit These Petitioners to Pursue Recovery of These Very Damages from the Funds Trustees.

As part of the reasoning supporting its holding that under ERISA, participants and beneficiaries do not have derivative standing to sue the Record Companies for recovery of contributions owed to the Funds, the Eleventh Circuit stated that:

> Our holding does not leave beneficiaries without a remedy when the trustees, in breach of their fiduciary duty, unreasonably refuse to sue to recover delinquent contributions. Congress provided that trustees who breach their fiduciary duty "shall be personally liable to make good to the plan any losses resulting from each such breach," ERISA § 409(a) (codified at 29 U.S.C. § 1109(a) (1994)), *and provided for a cause of action by a beneficiary for such a breach in section 502(a)(2).*

App. A at 24a (emphasis added).

The cause of action referred to by the panel is precisely the claim Petitioners asserted in Counts Two, Five and Six of the complaint, but which was foreclosed by the district court and the Court of Appeal's opinion. In these Counts, as discussed below, petitioners asserted claims against the Funds' Trustees under section 502(a)(2) to make good to the Plan losses caused to the Plan by the Trustees' failure to collect all of the contributions owed. Yet as discussed below, the panel's disposition of these claims appears to foreclose the ability to use section 502(a)(2) as a vehicle to redress damages caused to the entire Plan by the Trustees' failure to collect delinquent contributions.

In order for the cause of action under section 502(a)(2) to be an adequate substitute for a derivative claim for collection of delinquent contributions directly against the Record Companies (as the Eleventh Circuit suggests it is), petitioners must be permitted to recover from the Trustees all of the damages caused to the plan by the breach, not just damages related to their individual situations. Either recovery of plan damages should be permitted by allowing a delinquent contribution suit, or recovery of plan damages should be permitted (from the Trustees) by allowing a mandatory class action to proceed on behalf of the plan under section 502(a)(2). The district court and the court of appeals foreclosed both remedies.

B. THE RULINGS OF THE COURTS BELOW DENYING MANDATORY CLASS STATUS TO PETITIONERS VIOLATE THE STATUTORY SCHEME UNDER ERISA, WHICH PROVIDES IN SECTION 502(a)(2) AN AVENUE FOR THE REDRESS OF FIDUCIARY BREACHES THAT INJURE THE PLAN AS A WHOLE, AND ALL OF ITS PARTICIPANTS AND BENEFICIARIES, AND IN FACT PROHIBITS THE PURSUIT OF "INDIVIDUALIZED" BREACH OF FIDUCIARY DUTY CLAIMS.

1. This Petition Should Be Granted to Resolve the Question of the Appropriate Role of the Class Action Device for Cases Where Petitioners Sue to Recover Not Their Own Damages, but Damages to the Plan under ERISA Section 502(a)(2).

The statutory scheme allows for recovery of damages for Plan-wide injury caused by breaches of fiduciary duty. *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985). In essence, section 502(a)(2) confers *direct* standing on plaintiffs to bring what is essentially a derivative claim on behalf of the Funds for recovery of Funds' damages. Consistent with the statutory scheme and with the cases discussing the

appropriate procedural protections for a claim asserted under section 502(a)(2), petitioners sought class action treatment for these claims. *See Mertens v. Kaiser Steel Retirement Plan*, 744 F. Supp. 917 (N.D. Cal. 1990). In the case *sub judice*, however, both lower courts ruled that class certification must be denied because petitioners were pressing claims for individual relief, requiring individualized proof.[3] By so ruling, the courts below have taken away an avenue of relief that has been explicitly afforded to plaintiffs under ERISA's statutory scheme; i.e., the ability to obtain under section 502(a)(2) redress of systemic breaches of fiduciary duty, breaches *that injure the Plan as a whole, and through the Plan, all of its participants and beneficiaries derivatively. Id.* at 142. *See also Varity v. Howe*, 516 U.S. 489, 116 S. Ct. 1065, 1077 (1996) (section 502(a)(2) was concerned with fiduciary obligations affecting the Plan's financial integrity). While these rulings leave intact an individual plaintiff's right to determine how his benefits were affected by the Trustees' failure to collect contributions owed as to him, and to recover for such losses, by their terms these rulings foreclose petitioners from proving how the Trustees' fiduciary breaches injured *the Funds* and jeopardized its assets.

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3. The Eleventh Circuit stated:

> In order to determine whether, with respect to any of the eighteen plaintiffs or any of the putative class members, a particular Record Company Defendant owes the Funds anything, the district court would have to examine each singer's contract with the record company.

App. A at 10a. This is not so. Not even the Funds' *auditors* reviewed the artists' contracts in determining whether the Record Companies properly reported gross compensation. Instead, the Funds' auditors accepted without question that the amounts reported on the artists' royalty statements as royalty earnings were properly calculated under the royalty contract between the record company and the artist. What the auditors did was determine whether the correct compensation was reported to the Funds based on what was shown as earned or paid on the royalty statements.

The protection of plan assets is an important goal of the statutory scheme under ERISA. *Varity*, 516 U.S. at 511. The rulings of the courts below denying class certification of the claims under section 502(a)(2) thwart that goal by precluding the redress of plan-wide injury and the correction of the systemic abuses described in the complaint.

2. Class Certification of Petitioners' Claims for Breach of Fiduciary Duty Brought "On Behalf of the Plan" is Appropriate as it Provides Procedural Protections to Participants and Beneficiaries Whose Rights Would be Affected by the Suit.

The focus of this case is the Trustees' failure to operate the Funds properly and in the best interests of all of its participants and beneficiaries. Petitioners allege that these breaches of fiduciary duty injured *the Funds and, through the Funds, all of its participants and beneficiaries*. It is for these *systemic* failures that petitioners brought suit under section 502(a)(2) of ERISA, and for which they sought class certification.

Class certification was sought in this case as a *protection* to the absent class members, whose rights could be affected by the outcome of a suit that seeks to litigate the interests of the Plan. The propriety of class action treatment for claims brought in a representative capacity under section 502(a)(2) was discussed at length in *Mertens v. Kaiser Steel Retirement Plan*, 744 F. Supp. 917 (N.D. Cal. 1990). After recognizing that section 502(a)(2) actions must be brought in a representative capacity on behalf of the benefit plan, the *Mertens* court stated:

> In section 409 actions plan participants and beneficiaries lack the direct right to relief typically held by class members, since the actions are brought on behalf of benefit plans. Nevertheless, they retain vital interests in those suits, since any equitable or monetary relief awarded to the plan would ultimately benefit them.
>
> * * *

> In order to achieve these ERISA objectives, the notice normally accorded to absent class members under Federal Rule of Civil Procedure 23(c)(2) should be available to absent plan participants and beneficiaries in section 409 actions. Although no opt out opportunity can be granted, since the right to recovery belongs to the benefit plan, notice of the action would at least afford absent parties the opportunity to consider intervention in order to safeguard their derivative interests.

744 F. Supp. at 921.

In *Specialty Cabinets & Fixtures, Inc. v. American Equitable Life Ins.*, 140 F.R.D. 474 (S.D. Ga. 1991), the court reached the same conclusion. Addressing the unique nature of a representative action under section 502(a)(2), the court stated:

> Because a plan participant or beneficiary may bring an action to remedy breaches of fiduciary duty only in a representative capacity, such an action affects all participants and beneficiaries, albeit indirectly. Courts hearing such cases therefore should afford some protection to these other participants and beneficiaries.

Id. at 478.

Similarly, in *Kane v. United Indep. Union Welfare Fund*, 1998 U.S. Dist. LEXIS 1965 at * 24-25 (E.D. Pa. February 23, 1998), the court, while denying class certification of claims for lost benefits due to allegedly faulty COBRA notices, granted certification of plaintiffs' breach of fiduciary duty claims under 502(a)(2), based on the Trustees' prohibited transactions, because the claims were asserted in a representative capacity.

These cases demonstrate not only that class certification is appropriate, but also that certification of an non-opt out class under Rule 23(b)(1)(B) is appropriate. In these claims, petitioners assert not their own claims for fiduciary breach, but rather the claims of the Funds themselves. As each petitioner

asserts an identical claim, seeking to remedy the identical injury (i.e., the injury to the plan) certification of a mandatory non-opt out class under Rule 23(b)(1)(B) is appropriate.

Thus, the issue on the fiduciary breach claim is not, as the Eleventh Circuit characterized it, "whether, with respect to a particular plaintiff, a particular Record Company owes the Funds anything." App. A at 10a. Rather, the issue is whether the Trustees breached their fiduciary duty *to the Funds* by, for example, wrongfully settling the audit claims. The ruling of the court below prevents petitioners from presenting the fundamental issues in this case for adjudication and violates ERISA's statutory scheme by foreclosing an avenue of relief available to petitioners under the statute.

C. WHERE THIS COURT HAS INSTRUCTED THAT SECTION 502(a)(3) PROVIDES A "SAFETY NET" TO REMEDY INJURIES CAUSED BY VIOLATIONS OF ERISA THAT SECTION 502 DOES NOT ELSEWHERE REMEDY, IT WAS ERROR TO DISMISS THIS CLAIM.

1. This Court Should take this Petition to Consider the Unresolved Question of the Applicability of the "Catch-all" Provision of Section 502(a)(3) where ERISA does not Otherwise Provide a Remedy for the Alleged Violations.

In Count Four of the Complaint, plaintiff pled a cause of action against the Record Company Defendants pursuant to ERISA section 502(a)(3). That section provides in pertinent part:

> A civil action may be brought —
>
> (3) By participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of the subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to address such violations or (ii) to enforce any

> provisions of this sub chapter or the terms of the plan.

29 U.S.C. § 1132(a)(3). Consistent with the language of section 502(a)(3) the *ad damnum* clause appended to Count Four of the Complaint requested the following relief:

> a. **appropriate equitable relief** to redress the ongoing failure by the Record Company Defendants and the Defendant Class to comply with contractual and statutory mandates and to enforce the provisions of the Phono Code and the Related Plan Documents, including but not limited to:
>
> > i. an accounting of all Gross Compensation rightfully payable to Plaintiffs and the Plaintiff Class and a determination of the correct amount owed to the Funds as a consequence of such amount as is determined; and
> >
> > ii. a declaratory judgment finally resolving the interpretation disputes surrounding the meaning of the term "gross compensation," as used in the 1990-1993 Phono Code and all prior codes.
>
> b. Attorneys fees and the costs of this suit; and
>
> c. **Such other and further relief as this Court may deem necessary and appropriate.**

App. F at 62a-63a (emphasis added).

The courts below dismissed plaintiffs' claim under section 502(a)(3) against the Record Company Defendants, even though they also ruled that petitioners *have no remedies* under any other subsection of section 502 against the Record Company Defendants.

These rulings run directly afoul of this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489, 509 (1996). After analyzing

the language of subsections 502(a)(3) and 502(a)(5), this Court held that:

> The language of [these] two subsections . . . creates two "catchalls," providing "appropriate equitable relief" for "any" statutory violation. This structure suggests that "catchall" provisions act as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy.

Id. at 512. This Court further held that:

> Thus we should expect that where *Congress also provided adequate relief for beneficiaries injury, there will likely be no need for further equitable relief, in which case such relief would not be appropriate*. [citation omitted]. But that is not the case here. The plaintiffs in this case could not proceed under the first subsection because they were no longer members of the Massey-Ferguson Plan and, therefore, had no "benefits due [them] under the terms [of the] Plan." § 502(a)(1)(b). They could not proceed under the second subsection, because that provision, tied to § 409, does not provide a remedy for individual beneficiaries. [citation omitted]. *They must rely on the third subsection or they have no remedy at all*. We are not aware of any ERISA-related purpose that denial of a remedy would serve. Rather we believe that granting a remedy is consistent with the literal language of the statute, the Act's purposes, and pre-existing trust law.

Id. at 515 (emphasis added).

The rulings dismissing the section 502(a)(3) claim leave petitioners with no remedy under ERISA at all, and run

directly afoul of this Court's reasoning in *Varity*[4]. Thus, this Court should grant this petition.

2. Eleventh Circuit Disposition of the Question Presented by the Appeal Creates a New Pleading Standard at Variance with Established Law.

The Eleventh Circuit did not reach the issue of whether Count Four should be dismissed because Congress provided petitioners with other appropriate relief. Rather, it dismissed Count Four for a pleading error not raised below; that is, that Count Four contains no allegations *within the four corners of the count*, that the Record Company Defendants violated a substantive provision of ERISA or the terms of the plan. Specifically, as the panel stated:

> Count IV contains no allegation, within the four corners of that count, that the Record Company Defendants violated a substantive provision of ERISA or the terms of the Funds [sic]. To be sure, Count IV incorporates, by reference, all of the 181 paragraphs preceding it. Imbedded in these paragraphs are allegations that the Record Company Defendants failed to carry out their obligations under the Phono Code — specifically, to contribute a percentage of the singers' gross compensation to the Funds. We would be in serious dereliction of our appellate duty, however, if we allowed this sort of "shotgun pleading" to substitute for, at a bare minimum, an allegation of what law these defendants purportedly broke.

App. A at 24a.

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4. Had the lower courts permitted petitioners to pursue their *derivative* claim for delinquent contributions it may indeed have been appropriate for them rule that there would be no need for "further equitable relief" under section 502(a)(3). Having ruled, however, that petitioners may not proceed under any other subsection of section 502, it was error for the court below to also rule that petitioners could not obtain appropriate equitable relief.

Petitioners assert that in dismissing Count Four on the basis alleged, the Eleventh Circuit created a pleading standard at variance with established law. *See, e.g.*, Fed. R. Civ. P. 10. Even if the specific violation of ERISA or the terms of the plan were *not* spelled out within the *four corners* of Count Four[5], that is not basis to dismiss Count Four for failure to state a claim for relief. As the Eleventh Circuit itself previously held:

> A Complaint need not specify in detail the precise legal theory giving rise to recovery. All that is required is that the defendant be on notice as to the claim being asserted against him and the grounds on which it rests.

Sam's v. United Food & Commercial Workers International Union AFL-CIO, CLD, 866 F.2d 1380, 1384 (11th Cir. 1986). In *Sam's*, despite the fact that the *entire complaint did not even mention the collective bargaining agreement*, the court found

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5. The panel was mistaken in ruling that specific allegations regarding defendants' failure to carry out their obligations under the Phono Code and ERISA were not set forth *within the four corners* of Count Four. To the contrary, Count Four itself contains the following allegation among others:

> 183. As set forth more fully above, the Record Company Defendants and the Defendant Class *violated their statutory and contractual obligations by, inter alia,*
>
> a. improperly calculating (if calculating at all) the amount of contributions payable to the Funds on behalf of Plaintiffs and the Plaintiff Class by impermissibly using a "Net Compensation" figure rather than "Gross Compensation" as the basis for calculating the required contributions to the Funds, *in direct violation of the Phono Code.*

App. F at 60a, emphasis added. Thus, the very allegation that the Circuit Court stated was *not* pled in Count Four, but was rather "imbedded" in one of the 181 paragraphs preceding Count Four, is in fact specifically alleged within the four corners of Count Four itself. In addition, Count Four alleges seven other specific violations of ERISA or the terms of the Plan, as more particularly set forth in ¶¶ 183(b) - (h). App. F at 60a-61a.

that the complaint adequately alleged breach of the collective bargaining agreement, actionable under section 301 of the Labor-Management Relations Act.

Here, there is no suggestion that the Record Company Defendants (or the district court) lacked notice of, or failed to comprehend the violations of ERISA or the terms of the Phono Code for which Count Four seeks redress. Indeed, the Eleventh Circuit itself recognized that the Complaint alleges "that the Record Company Defendants failed to carry out their obligations under the Phono Code — especially to contribute a percentage of the singers' gross compensation to the Funds." App. A at 25a.

Thus, the panel's decision to dismiss Count Four for failure to restate within the four corners of the count itself allegations that are admittedly elsewhere pled in the complaint, and incorporated by reference as permitted by Fed. R. Civ. P. 10(c), establishes a standard for pleading at variance with established law.

D. THE COURT BELOW ERRED WHEN IT AFFIRMED THE DENIAL OF CLASS CERTIFICATION OF PETITIONERS' RICO CLAIM ASSERTED AGAINST THE RECORD COMPANY DEFENDANTS.

1. This Court Should Resolve the Issue of Whether in a RICO Case Predicated on Mail Fraud, Petitioners Must Demonstrate That They Directly Received and Relied on Fraudulent Mailings, Where Petitioners Were the Target of and Were Directly Injured by the Scheme.

Petitioners moved for class certification of their RICO claim against the Record Company Defendants pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. The district court denied petitioners' motion on "typicality" and "predominance" grounds, ruling that under the Eleventh Circuit's decision in *Pelletier v. Zweifel*, 921 F.2d 1465 (11th

Cir. 1991) "to establish mail fraud, each class member will have to show reliance on defendant's alleged fraudulent conduct." App. C at 37a-38a. Yet under this Court's decision in *Holmes v. Securities Investors Protection Program*, 503 U.S. 258, 268 (1992), petitioners need only demonstrate proximate cause, i.e., "some direct relationship between the injury asserted and the injurious conduct alleged." In this case, where petitioners are the targets of respondents' scheme, and where they were directly injured by respondents' fraudulent conduct, is not also necessary that petitioners demonstrate receipt of and reliance on the mailing. To the contrary, the reliance element of petitioners' civil RICO claim may be demonstrated on a class-wide basis with evidence that the Funds, *petitioners' fiduciary*, relied on the false mailings in determining plaintiffs' benefits.

Petitioners presented evidence in the district court *sufficient to sustain a jury verdict that the Record Company Defendants directly injured petitioners by engaging in predicate acts of mail fraud*. As the district court found:

> Specifically, the court finds that the Record Company Defendants' submission of allegedly fraudulent reports *directly* controlled the Funds' calculation of benefits due plaintiffs and a reasonable jury could conclude that the Record Company Defendants had a significant degree of control over this vital aspect of the Funds affairs. *See Aetna Cas. Sur. Co. v. P & B Autobody*, 43 F.3d 1546, 1559 (1st Cir. 1994) *amended by Aetna Cas. Sur. Co. v. P&B Autobody*, 1994 U.S. Lexis 36770 (1st Cir. 1994). Similarly, the court finds that genuine issues of fact exists regarding whether the Record Company defendant involvement in the audit process including the role of Norman *Samnick*, was sufficient to meet the "operation and management" test of *Reves*.
>
> * * *

> The Record Company Defendants also contend that they are entitled to summary judgment on plaintiffs RICO claim because there is no evidence in the record that the Record Company Defendants committed mail fraud — the only predicate act alleged by plaintiffs. The court finds sufficient evidence in the record to preclude summary judgment on this issue. *There is evidence from which a jury could infer a scheme to defraud the Funds, plaintiffs or both. Though the Schedule C's were sent directly to the Funds there is no question that plaintiff suffered direct injury from any erroneous information contained therein.*

App. D at 48a-49a (emphasis added). Later, however, the district court denied class certification based on its conclusion that the Eleventh Circuit Court's decision in *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991), required a demonstration that each schedule was false and of individual reliance by each class member on each fraudulent schedule.

> Plaintiffs' RICO claim consists of the allegation that the Record Company defendants, with the intent to defraud, sent false statements about each class member through the mail; that each class member relied on representations made in furtherance of the Record Company defendants scheme to defraud, and that each class member's reliance was reasonable. Plaintiffs do not allege one misrepresentation that affected each of the individual performers but rather plaintiffs allege numerous separate misrepresentations as to each performer. Thus to establish mail fraud, each class member will have to show reliance on defendant's alleged fraudulent conduct. *See Pelletier v. Zweifel*, 921 F.2d 1465, 1499-1500 (11th Cir. 1991).

App. C at 38a. Whether a RICO claim predicated on mail fraud requires a demonstration of actual reliance upon a fraudulent

mailing under circumstances where petitioners have been directly injured by the RICO predicate acts has not been resolved in this Court.

2. Where Petitioners were Directly Injured by the RICO Predicate Acts the Reliance Element of the Rico Violation Can Be Established on a Class-wide Basis with Evidence Showing That the Funds, Petitioners' Fiduciary, Relied.

Petitioners allege that each defendant engaged in a massive scheme to defraud each Class as a whole, through *its pattern of dealings with AFTRA Health and Retirement Funds*. This scheme, which the district court found was targeted at petitioners and directly injured petitioners (as required by *Holmes v. SIPC* and *Pelletier v. Zweifel*), was furthered by violations of the mail fraud statute (18 U.S.C. § 1341). Whether the respondents engaged in predicate acts of mail fraud does not turn on, therefore, a determination of whether each report of earnings was false. Rather, to establish that the respondents committed predicate acts of mail fraud, petitioners must show only that: (1) respondents engaged in a scheme to defraud petitioners of the benefits rightfully due; and (2) the use of the mails in furtherance of that scheme. *See also United States v. Wingate*, 997 F.2d 1429, 1432 (11th Cir. 1993).

In addition, as this Court stated in *Holmes v. Securities Investor Protection Services*, 503 U.S. 258, 268 (1992), petitioners must demonstrate proximate cause, that is, injury "by reason of" the violation. 18 U.S.C. § 1964(c). Thus, neither RICO nor the mail fraud statute requires that *each* mailing be fraudulent or that *each* mailing be received by the petitioners.

In this case, the mailings by which the record companies carried out their scheme to defraud petitioners (i.e., the remittance reports) were mailed by the record companies *to the Funds* and relied on *by the Funds* in determining petitioners' benefits. In denying summary, judgment the district court ruled that even though the mailing was directed to the Funds,

petitioners and the Class were the targets of the alleged scheme, and they suffered direct injury from the Funds reliance on the mailing. These rulings are sufficient to establish liability under RICO.

The detrimental reliance element of a civil RICO claim may be fulfilled by a *third party's reliance on fraudulent mailings that operate to injure the target of the scheme.* In *Pine Ridge Recycling, Inc. v. Butts County*, 855 F. Supp. 1264, 1294 (M.D. Ga. 1994), the court discussed this very issue. There, plaintiff alleged that the defendants, in a effort to injure plaintiff, a competitor, wrote to the Georgia EPD falsely stating that plaintiff's proposed development plan did not comply with local law. In denying defendants' motion to dismiss plaintiff's RICO claim, the court stated:

> Defendants contend that in order to establish a RICO claim plaintiff must show that they, rather than a third party, relied upon the fraudulent mailings. Defendants cite *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991), as requiring a plaintiff to prove his reliance on the predicate offense. However, ***Pelletier*** *requires no such thing*; instead, the case holds that a private plaintiff under RICO must show that he suffered injury as a proximate cause of the offense. . . .
>
> *In a case where the mail fraud is directed at a third party, reliance by that third party can cause injury to the plaintiff. A plaintiff need only show that the third party relied and that this reliance proximately caused plaintiff's injury.* Plaintiffs have alleged such injury.

855 F. Supp. at 1274 (emphasis added). Here, as in *Pine Ridge*, in an effort to injure petitioners, the respondents submitted fraudulent remittance reports to the Funds, which they knew would, and in fact did induce reliance by the Funds to petitioners' detriment. Indeed, the case at bar is even more

compelling than the situation presented in *Pine Ridge*, as the fraudulent mailings here were directed to and induced reliance in petitioners' *fiduciary*. Proof of reliance by the Funds, petitioners' fiduciary, is demonstrable, and in fact self evident, on a class-wide basis.

The petitioners, in turn were reasonable to rely on their fiduciaries who are charged under federal law with the duty to protect petitioners. "Reliance on the representations of fiduciaries would certainly be reasonable", *Benson v. RMJ Sec. Corp.*, 683 F. Supp. 359, 377 (S.D.N.Y. 1988), and, indeed, such reliance should be presumed. *Cf. In re American Continental Corp./Lincoln Sav. & Loan Sec. Liting.*, 140 F.R.D. 425, 433-34 (D. Ariz. 1992) (Certifying class for securities fraud and RICO case and presuming reliance under the "fraud on the regulatory process" doctrine).

CONCLUSION

Wherefore, Plaintiffs/Petitioners respectfully request that this Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED JUNE 29, 2000

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 98-8895, 98-9263

SAMUEL D. MOORE, CURTIS MAYFIELD, et al.,

Plaintiffs-Appellants,

v.

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, AFTRA HEALTH AND RETIREMENT FUND, et al.,

Defendants-Appellees.

June 29, 2000

* * *

Appeals from the United States District Court for the Northern District of Georgia.

Before ANDERSON, Chief Judge, and TJOFLAT and FAY, Circuit Judges.

TJOFLAT, Circuit Judge:

Plaintiffs, eighteen recording artists, brought this suit against their union's benefit plans, AFTRA Health and

Retirement Funds (the "Funds"); the trustees of the Funds ("Funds Trustees"); and eight record companies (the "Record Company Defendants") who contribute to the Funds on plaintiffs' behalf. Plaintiffs' complaint contains eight counts, each purporting to allege a separate cause of action.[1] Albeit under separate theories of recovery, all eight counts allege that the Record Company Defendants, with whom the plaintiffs have recording contracts, improperly interpreted the provision of the union's collective bargaining agreement with the record companies that determines the amount the companies should contribute to the Funds on the plaintiffs' behalf, and therefore failed to contribute the amounts due. The eight counts also allege that the Funds Trustees breached their fiduciary duty by failing to collect the delinquencies.

After filing suit, the plaintiffs moved the district court to certify a class of recording artists for the purpose of litigating three breach of fiduciary duty claims against the Funds Trustees and a civil RICO claim against the Record Company Defendants. The district court denied the plaintiffs' motion. In its order, the court certified a question of law for appeal under 28 U.S.C. § 1292(b) (1994), and we granted the plaintiffs leave to appeal the order, Appeal No. 98-9265. Appeal No. 98-8895, which is from a final judgment entered pursuant to Rule 54(b) of the Federal Rules of Civil

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1. As we set out *infra*, the plaintiffs filed a complaint and two amended complaints. The second amended complaint contains nine counts, which we treat as eight counts because one, Count IV, does not state a cause of action. Rather, it merely seeks equitable relief for unspecified violations of law, labeled "statutory violations," by the Record Company Defendants. Six of the counts of the second amended complaint are implicated in these appeals.

Procedure, presents the question whether the district court properly dismissed two claims against the Record Company Defendants: a derivative delinquent contribution claim under the Employee Retirement Income Security Act of 1974 ("ERISA") section 509(g)(2) (codified at 29 U.S.C. § 1132(g)(2) (1994)); and a claim for equitable relief under ERISA section 509(a)(3) (codified at 29 U.S.C. § 1132(a)(3)). We find no abuse of discretion in the district court's denial of class certification and no error in the court's dismissal of these ERISA claims, and accordingly affirm.

I.

A.

Plaintiffs and the class they seek to represent are recording artists; all of them are singers.[2] Through agents, they negotiate and enter into individual contracts with record companies, including the Record Company Defendants, relating to the creation, promotion, and sale of record albums. The plaintiffs are compensated with royalties; the record companies receive the profits from the sale of the albums.

The American Federation of Television and Radio Artists ("AFTRA"), a union, represents the singers (and thus

2. The plaintiffs in this case include a number of inductees into the Rock & Roll Hall of Fame in Cleveland, Ohio, such as: Samuel Moore, one half of the singing duo Sam and Dave; Curtis Mayfield, famous for his work on the soundtrack to the motion picture "Superfly"; Brian Hyland, who had his first success in 1960 with the song "Itsy Bitsy Teenie Weenie Yellow Polka Dot Bikini"; and Carl Garder, lead singer of the 1950s doo-wop group The Coasters.

the plaintiffs) and several other categories of entertainers, such as actors and musicians. At all times material to this suit, a collective bargaining agreement for the benefit of the singers has existed between AFTRA and the record companies (including the Record Company Defendants). This agreement is called "Phono Code."

The Phono Code originated in the mid-1950s. In 1959, AFTRA and the record companies (and other entities not pertinent here) entered into an Agreement and Declaration of Trust ("the Trust Agreement") in order to provide fringe benefits for singers (and other artists AFTRA represents). The agreement created two funds, a health fund and a retirement fund, "the Funds", and twenty trusteeships, the Funds Trustees. Ten of the trustee positions are held by individuals chosen by the record companies, and ten are held by individuals chosen by AFTRA.[3] Contemporaneously with the enactment of the Trust Agreement, AFTRA and the record companies amended the Phono Code in order to provide underwriting for the singers' benefits; the amendment incorporated by reference the Trust Agreement and obligated the record companies to contribute to the Funds five percent of the "gross compensation" the companies paid to the singers. Through amendments, that percentage has become eleven percent.

Under the Trust Agreement, the Funds Trustees have "full authority to determine the form, nature, and amount of

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3. Only one of the ten record company trustees named as defendants, Norman Samnick, is associated with the record companies that are defendants in this action. The others were selected by companies not involved in the present action.

benefits" to be paid to the singers, and are "authorized and empowered to . . . compromise, settle, arbitrate and release claims or demands in favor or against" the Funds and to "construe the provisions of the Trust Agreement." Any construction of the agreement the Funds Trustees render "in good faith" is "binding" on AFTRA and the record companies.

The Phono Code requires a record company to send the Funds and each singer with whom it has contracted a semi-annual statement of the "gross compensation" the company has paid the singer during the previous six months.[4] The central issue in these appeals (and in the counts of the complaint not before us) is the meaning of the term "gross compensation."[5] In 1959, when the Trust Agreement was created and the Phono Code was amended to incorporate its terms, a singer's "gross" compensation amounted to the royalty payments he received from his record company for the albums it sold. Since the parties' recording contract obligated the company to underwrite all of the costs of

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4. For example, if the singer has earned $100,000 in royalties, and the percentage the record company is required to contribute to the Funds is eleven percent, the statement would reflect that the singer has earned $100,000 and the company has paid (or will pay) the Funds $11,000.

5. The term "gross compensation" appears in the collective bargaining agreement. It does not appear in the Trust Agreement. The Trust Agreement states that record companies will contribute "the amount required by the collective bargaining agreements . . ., [and] the rate and amount shall at all times be governed by said collective bargaining agreements."

producing and selling an album,[6] it deducted nothing from the royalties; hence, there was no such thing as "net" compensation. Over time, however, the record companies shifted the costs of producing and selling albums to the artists, such that by the 1970s the singers had assumed the lion's share of these costs.[7] Not infrequently, a contract between a record company and a singer called for the company to front certain costs. The singer would reimburse the company from royalties, in which case, the company's semi-annual statement to the singer and the Funds would reflect as "gross" compensation the "net" compensation actually paid to the singer — after deducting the costs the company had fronted. The result of this arrangement was that the term "gross compensation" in the Phono Code became ambiguous. The record companies took the position that the term did not include the expenses it fronted for the singer; the Funds Trustees, once the ambiguity was called to their attention, disagreed; gross compensation included such expenses. Which interpretation of gross compensation is correct would depend on what AFTRA and the record companies intended the phrase to mean when the phrase first appeared in an amendment to the Phono Code. Nothing in the record, however, indicates what AFTRA and the record companies had in their minds and said to one another when they adopted the phrase "gross compensation."

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6. These production costs included "studio time," the wages paid to accompanying musicians, and advertising and distribution expenses.

7. The record before us does not indicate precisely when this occurred; all that the record discloses is that the parties spotted the ambiguity discussed in the text *infra* in the 1970s.

In any event, as early as the 1970s, the record companies and the Funds Trustees attempted to resolve this problem through negotiations. Their efforts failed, and the record companies adhered to their interpretation of "gross compensation." The Funds Trustees and AFTRA acceded to the record companies' interpretation rather than seeking a judicial declaration that gross compensation included the monies the companies fronted the singers and deducted from their royalties.[8] In 1995, AFTRA and the record companies eliminated the problem when they renegotiated the Phono Code and defined the phrase "gross compensation."[9]

B.

The plaintiffs brought the instant action in 1993, prior to the Phono Code amendment defining gross compensation.

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8. AFTRA may have foregone suit because it would be unable to establish that, during the negotiations over the 1959 amendment to the Phono Code, the meaning of the phrase gross compensation was discussed. The court, lacking evidence of the parties' mutual intent, would have no choice but to "leave the parties where it found them." *Reynolds v. Roberts,* 202 F.3d 1303, 1316-17 (11th Cir. 2000) (quoting 4 *Williston on Contracts* § 627 (3d ed.1961)). The record indicates that the Funds Trustees chose not to litigate the issue because (1) the chance that they would prevail was far from clear, and, if they lost the case, the Funds' assets would be depleted, and (2) their periodic audits of the record companies' semi-annual statements to the singers had produced adequate resolutions of the singers' claims that the companies had under-reported gross compensation, and thus the amount of the contribution due the Funds.

9. The definition includes within gross compensation a few of the expenses the record companies had been fronting for the singers and deducting from their royalties.

In their complaint, they sought to recover (for the benefit of the Funds and thus indirectly themselves) the contributions they contend the record companies should have paid to the Funds from the time the companies started fronting expenses for the singers and deducting those expenses from their royalties to the day plaintiffs filed their suit. The plaintiffs amended their complaint twice.[10] In 1996, after the Funds Trustees rejected the plaintiffs' demand that they bring suit against the record companies (for the Funds contributions the plaintiffs contend were due), they filed a second amended complaint (the "complaint") which seeks recovery of sums allegedly due from the Record Company Defendants for the period extending from the 1970s to the 1995 amendment of the Phono Code.[11]

The plaintiffs' complaint resembles the "shotgun" pleading we condemned in *Pelletier v. Zweifel,* 921 F.2d 1465, 1518-19 (11th Cir.1991). It is 96 pages long with 232 numbered paragraphs; each count incorporates by reference all previous paragraphs. Counts I, II, IV, V, VI, and VII are implicated in these appeals. Counts II, V, VI, and VII are here because the district court refused to certify them as class actions. Counts I and IV are here because the district court

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10. The district court dismissed the plaintiffs' complaint in part for failure to exhaust the administrative remedies provided by ERISA. *See Mason v. Continental Group, Inc.,* 763 F.2d 1219 (11th Cir.1985). The plaintiffs subsequently exhausted these remedies. The exhaustion of remedies is not an issue in these appeals.

11. In, therefore, the discussion that follows, we refer to the sums allegedly due from the Record Company Defendants as the "delinquencies."

dismissed them for failure to state a claim for relief. *See* Fed.R.Civ.P. 12(b)(6). In part II, we review the court's refusal to grant class certification; in part III we review the court's Rule 12(b)(6) rulings.

II.

A district court's decision to grant or deny class certification is discretionary; hence, we review the court's decision under the abuse-of-discretion standard. *Hudson v. Delta Air Lines, Inc.*, 90 F.3d 451, 455 (11th Cir.1996); *see also Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1381 (11th Cir.) (en banc) ("[D]enials of class certification usually stand."), *cert. denied*, 525 U.S. 1019, 119 S.Ct. 545, 142 L.Ed.2d 453 (1998).

In order to obtain class certification of Counts II, V, VI, or VII, the plaintiffs had to satisfy all four of the conditions of Rule 23(a) of the Federal Rules of Civil Procedure:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

In addition, plaintiffs had to demonstrate that one of the three conditions of Rule 23(b), subsections (1), (2), or (3) applied: that either (1) prosecution by separate actions would create a risk of inconsistent results; (2) the defendant has acted in

ways generally applicable to the class, making declaratory or injunctive relief appropriate; or (3) common questions of law or fact predominate over individual issues. With these requirements in mind, we consider whether the district court abused its discretion in denying class certification on Counts II, V, VI, and VII.

A.

Counts II, V, and VI are similar in that they allege that the Funds Trustees breached their fiduciary duty to the Funds when they decided not to sue the Record Company Defendants for the delinquencies. Given this similarity, we review collectively the district court's decisions whether to certify these counts as class actions.[12]

In order to determine whether, with respect to any of the eighteen plaintiffs or any of the putative class members, a particular Record Company Defendant owes the Funds anything, the district court would have to examine each singer's contract with the record company. Because the singers' contracts with the record companies were not identical — in terms of the royalties to be paid the singers and the parties' allocation of expenses — only by undertaking such examination could the court know what expenses the record company fronted the singer and thus the expenses that should or should not have been included as gross compensation in the company's semi-annual statement. The

12. The district court based its decisions on the allegations of the plaintiffs' complaint, the Funds Trustees' responsive pleadings, various pieces of evidence obtained by the parties in discovery, and, of course, the arguments of counsel.

district court also would have to take into account the fact that the Funds Trustees periodically reviewed the record companies' semi-annual statements to determine the accuracy of the information the record companies reported.[13] Not infrequently, such audits resulted in an increase in a company's contribution to the Funds. In sum, each case — those of the named plaintiffs and the putative class members as well — is different: the financial arrangements and the steps the Trustees took to ensure the record companies' compliance with the Phono Code differ.

Under these circumstances, it is doubtful, at the very least, that the plaintiffs satisfied the third condition of Rule 23(a). It is also doubtful that the plaintiffs satisfied any of the conditions of Rule 23(b). Having drawn these conclusions, we could hardly say that the district court abused its discretion in refusing to certify a class for Counts II, V, and VI. We therefore affirm the ruling the court certified for appeal under 28 U.S.C. § 1292(b).

B.

Plaintiffs bring Count VII under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c) (1994), which prohibits "any person employed by or associated with any enterprise engaged in . . . interstate commerce, to conduct or participate . . . in the conduct of such enterprise's affairs though a pattern of

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13. The Funds Trustees generally conducted these audits following a singer's complaint that the semi-annual statement was inaccurate, but sometimes the Trustees conducted them on their own initiative, as spot checks.

racketeering activity." Section 1962(c) does not create a civil remedy for engaging in such conduct. We assume that the plaintiffs meant to posit Count VII on 18 U.S.C. § 1964(c) (Supp. II 1996), which does creates a civil damages action for "[a]ny person injured in his business or property by reason of a violation of section [1962(c). Such a person] may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains. . . ." Count VII alleges that the Funds are an "enterprise," and that the Record Company Defendants associated with such enterprise "conduct[ed] or participate[d] . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity," specifically, the crime of mail fraud. The fraud consisted of the semi-annual statements that the Record Company Defendants sent to the plaintiffs and the putative class members (and the Funds). These statements were fraudulent because they misrepresented the singer's gross compensation. For example, if the record company paid a third party to whom the singer was indebted, treated the payment as a loan to the singer, and deducted the payment from the royalties due the singer, the company did not treat the payment as compensation and, thus, did not treat it as part of the singer's "gross compensation." According to the plaintiffs, the payment to the third party should have been treated as compensation. Because the record companies "mailed" the semi-annual statements, Count VII alleges, each mailing constituted the offense of mail fraud.

We assume for sake of discussion that Count VII alleges a case sufficient to withstand a motion to dismiss for failure to state a claim, in that the record companies, including those in this case, "(1) intentionally participate[d] in a scheme to

defraud [the singers] of money or property and (2) use[d] the mails . . . in furtherance of that scheme." *Pelletier,* 921 F.2d at 1498. We also assume that Count VII alleges the elements of a section 1964(c) damages suit by alleging "not only that the mail . . . fraud statute[ ] ha[s] been violated, but also that [the plaintiffs have] suffered injury as a result of the violation," *id.* at 1499, in that they "relied to [their] detriment on [the defendants'] misrepresentations made in furtherance of that scheme," *id.* at 1499-1500 (citing *O'Malley v. O'Neill,* 887 F.2d 1557, 1563 & n.9 (11th Cir.1989)). Having indulged these assumptions, we now consider whether the district court abused its discretion in refusing to certify Count VII as a class action.

Whether Count VII is appropriate for class treatment depends on what "questions of law or fact [are] common to the [putative] class," and what "questions of law or fact" are not. Fed.R.Civ.P. 23(a)(2). Most of the questions of fact are not common. Every singer had a different recording contract with his or her record company; in fact a singer may have had several contracts. The terms of a particular contract, including the allocation of expenses, depended on the negotiating skills of the singer's agent. The terms also depended on the singer's popularity and ability to generate revenue. The singers' reactions to the record companies' semi-annual statements also differed from singer to singer. Some found no error in the statements and accepted them at face value; some relied on their agents to monitor the statements, and they likewise found no error; others spotted what they perceived to be errors and complained to AFTRA; still others complained directly to the Funds Trustees, who may or may not have conducted an audit. For a court to

determine which statements contained errors would be a monumental task that could not reasonably be undertaken in one lawsuit.

When all is said and done, we find only two facts that are common to the RICO claims of the named plaintiffs and the putative class members: one is a collective bargaining agreement, the Phono Code; the other is that the record companies sent the singers' semi-annual statements through the mails. It requires no extensive analysis to conclude that this is not enough to satisfy the requirements of Rules 23(a) and (b). Rule 23(a)'s third condition — that the named plaintiffs' claims are typical of the claims of the putative class members — is not satisfied. In fact, the claim of one named plaintiff is not typical of the claim of another named plaintiff. And none of Rule 23(b)'s three conditions is satisfied: (1) the prosecution of separate actions would not create a risk of inconsistent results (because each plaintiff's factual scenario is different); (2) neither declaratory nor injunctive relief would be appropriate (because the Phono Code has been amended to eliminate the ambiguity that led to this suit); (3) common questions of law and fact do not predominate over individual issues, *see Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228 (11th Cir.2000) (citing *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (11th Cir.1997)). We therefore conclude that the district court acted well within its discretion in denying class certification with respect to Count VII.

III.

We now turn to the meat of this appeal, and a question of first impression in this circuit. The district court dismissed

plaintiffs' derivative delinquent contribution claim, Count I, predicated on ERISA section 502(g)(2), 29 U.S.C. § 1132(g)(2), on the grounds that ERISA does not allow "an action for damages against non-fiduciaries."[14] We review *de novo* the grant of a motion to dismiss for failure to state a claim for relief. *See Long v. Satz,* 181 F.3d 1275, 1278 (11th Cir.1999).

A.

By asserting a derivative delinquent contribution claim, the plaintiffs assume that they are entitled to step into the shoes of the Funds Trustees and prosecute a cause of action

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14. The district court cited *Useden v. Acker,* 947 F.2d 1563, 1581-82 (11th Cir.1991), for the proposition that our precedent forbids such a cause of action. *Useden,* however, does not stand for that proposition. In *Useden,* the trustee of a profit-sharing plan brought breach-of-fiduciary-duty claims against a bank and a law firm. The trustee alleged that the bank, which had made a loan to the plan and, on default, had seized the collateral securing the loan, and the law firm, which had been advising the plan regarding the loan, had violated various provisions of ERISA. We held that neither the bank nor the law firm qualified as fiduciaries. *Id.* at 1572-79. As an alternative to fiduciary liability, the trustee asserted that the bank and law firm could be liable as non-fiduciaries for participating in a breach with an ERISA fiduciary. Although the opinion in *Useden* is not entirely clear, it appears the trustee was alleging that the bank and the law firm had conspired with the trustee's predecessors to violate ERISA. We held that "there is no cause of action for monetary damages under ERISA sections 409(a) or 502(a) for the participation of a non-fiduciary in a fiduciary breach." *Id.* at 1582. The question now before us is different — whether a plan beneficiary has standing to sue derivatively *on behalf of the plan,* where the beneficiary alleges that the plan trustees have refused to sue and thus have breached their fiduciary duty to the plan.

— to collect the delinquencies due from the Record Company Defendants on behalf of the Funds — that only Funds Trustees have standing to bring. Two circuit courts, the Second and Third, have afforded beneficiaries of an ERISA-governed plan standing to prosecute a suit that only the plan trustees have the express authority to bring. *See Diduck v. Kaszycki & Sons Contractors, Inc.*, 874 F.2d 912, 916 (2d Cir.1989); *McMahon v. McDowell*, 794 F.2d 100, 109 (3d Cir.1986); *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 336-37 (3d Cir.1984). Drawing on traditional trust law, these courts held that, in order to bring a derivative suit for the recovery of delinquent contributions, a beneficiary must first establish that the trustees refused to sue and that their refusal amounted to a breach of their fiduciary duty to the plan. *See Diduck*, 874 F.2d at 916, *McMahon*, 794 F.2d at 109, *Struble*, 732 F.2d at 336-37. Neither circuit, however, has treated the beneficiary's standing to sue as a matter of statutory construction,[15] and neither circuit has considered the issue in light of the Supreme Court's rulings in *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 257-63, 113 S.Ct. 2063, 2069-72, 124 L.Ed.2d 161 (1993) and *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 145-48, 105 S.Ct. 3085, 3092-93, 87 L.Ed.2d 96 (1985), both of which warned lower courts to avoid reading new causes of action into ERISA.[16]

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15. These courts also did not consider the legislative history of section 502(g)(2), which, as we demonstrate *infra*, strongly suggests Congress did not intend to provide for derivative delinquent contribution suits.

16. In *Mertens*, 508 U.S. at 257-63, 113 S.Ct. at 2069-72, the Court, agreeing with our decision in *Useden*, *see supra* n.14, held

(Cont'd)

Appendix A

In interpreting a statute, we look first to the plain meaning of the statute. *See Watt v. Alaska,* 451 U.S. 259, 265, 101 S.Ct. 1673, 1677, 68 L.Ed.2d 80 (1981). We may look to evidence of Congressional intent outside the four corners of the statute if "(1) the statute's language is ambiguous; (2) applying it according to its plain meaning would lead to an absurd result; or (3) there is clear evidence of contrary legislative intent." *United States v. DBB, Inc.,* 180 F.3d 1277, 1281 (11th Cir.1999).[17]

(Cont'd)
that ERISA does not authorize a suit for money damages against a non-fiduciary who knowingly participates in a breach of fiduciary duty. In *Russell,* 473 U.S. at 138, 105 S.Ct. at 3088, the Court held that a fiduciary could not be held liable under ERISA for extra contractual compensatory or punitive damages for the untimely processing of benefits claims.

17. Plaintiffs point us to language in *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 108-09, 109 S.Ct. 948, 953-54, 103 L.Ed.2d 80 (1989), and *Useden,* 947 F.2d at 1581-82, which, they assert, stands for the proposition that ERISA incorporates traditional trust law "procedural devices and principles." Thus, they argue, since a derivative suit by a beneficiary was allowed at common law, *see* A. Scott, *Law of Trusts,* § 282.1 (3d ed.1967), we should read this remedy as part of the background of ERISA. We reiterate that our first job is to give effect to the plain meaning of the statute, and if this leads to an ambiguous or absurd result, then we attempt to effectuate Congress' intent through other materials. *See DBB, Inc.,* 180 F.3d at 1281. Moreover, we do not read *Useden* as incorporating the entire body of trust law into ERISA. Our court was careful to avoid exactly that:

> Thus, while it is obvious that ERISA is informed by trust law, the statute is, in its contours, meaningfully

(Cont'd)

Appendix A

B.

ERISA section 502(a)(1) allows a "participant or beneficiary" to bring an action only "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Here, the plaintiffs, in Count I, do not bring such an action; accordingly they must base their claim on another provision of ERISA. They point to section 502(g), which provides in relevant part:

> (1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(Cont'd)

> distinct from the body of the common law of trusts. A method of interpretation consonant with this realization will reject the unselective incorporation of trust law rules into ERISA. Rather, a court should only incorporate a given trust law principle if the statute's text negates an inference that the principle was omitted deliberately from the statute. ERISA is a "comprehensive and reticulated statute," *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361, 100 S.Ct. 1723, 1726, 64 L.Ed.2d 354 (1980), bearing the marks of circumspect drafters; courts should proceed with commensurate circumspection before concluding that a prominent feature of trust law was omitted from the statute merely through inadvertence.

Useden, 947 F.2d at 1581.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan —

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of —

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

> (E) such other legal or equitable relief as the court deems appropriate.

29 U.S.C. § 1132(g).[18]

Thus, by the plain meaning of the statute, Congress set up the following remedial scheme. In a suit brought by "a participant, beneficiary, or fiduciary" Congress gave the courts, in subsection (1), discretion to award attorney's fees and costs. But, in subsection (2), it only gave the courts the power to award the plan "unpaid contributions" and "interest" on such contributions in a suit brought "by a fiduciary for or on behalf of the plan."

Such a distinction makes perfect sense. Congress provided for an award of attorney's fees in subsection (1) so that beneficiaries, whose claims may be small, could attract the attention of competent attorneys to litigate their claims. But the reason for the laundry list of remedies in subsection (2) is different. The benefits of a lawsuit brought by a fiduciary accrue to the plan as a whole (and thus indirectly to the beneficiaries as a whole); but so do the costs.

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18. Section 1145 provides:

> Every employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

29 U.S.C. § 1145 (1994).

Appendix A

A fiduciary must, in performing his fiduciary duty, weigh the costs of litigation (including the risk of failure) against those benefits. By allowing the award of not only the unpaid contributions, but also interest, attorney's fees, and "other legal and equitable relief," Congress put its hand on the scale favoring litigation. In the end, Congress wanted to be sure that the *beneficiaries* received everything due them.

The passage of ERISA did not change the common law rule that fiduciaries of a plan have a breath of discretion in deciding when, and if, to bring an action to enforce the plan's rights. *See Alfarone v. Bernie Wolff Constr. Corp.*, 788 F.2d 76, 80 (2d Cir.1986) (holding that trustee's "refusal to file a suit to recover contributions allegedly due," does not, by itself, constitute a breach of fiduciary duty under ERISA); *cf., e.g., Seven G. Ranching Co. v. Stewart Title & Trust,* 128 Ariz. 590, 627 P.2d 1088, 1090 (1981) ("[A] trustee can properly compromise, submit to arbitration or abandon claims affecting the trust property provided that in so doing he exercises reasonable prudence."). There are many reasons why a fiduciary may choose, in his discretion, not to bring a lawsuit against a third party; this is true even if the chances of success are good. *See Restatement (Second) of Trusts,* § 192, cmt. c (1959) (stating a trustee may abandon a claim if the "expense of litigation or the character of the claim would make it reasonable not to bring suit . . ."). In fact, in some situations, a fiduciary could win a lawsuit against an employer under section 502(g)(2), but the failure to bring such a suit would be insufficient to prove a breach of fiduciary duty, because of the discretion given the fiduciary. *Cf. Alfarone,* 788 F.2d at 76-80. By allowing any beneficiary willing to allege a breach of fiduciary duty to bring a

derivative suit, the Second and Third Circuits have permitted that beneficiary to substitute his or her judgment for that of the trustees.

Even if we agreed with the plaintiffs that section 502(g) does not unambiguously preclude their prosecution of Count I, the legislative history of section 502(g) demonstrates that Congress intended that only fiduciaries should have standing to sue on behalf of a plan for delinquent contributions. Section 502(g) was added as part of the 1980 amendments to ERISA. *See* Multiemployer Pension Plan Amendments Act of 1980, P.L. 96-364, 94 Stat. 1208 (codified in scattered sections of 29 U.S.C.). The House version of the bill, passed by the House on May 22, 1980, contained the following language:

> In any civil action against any person to collect delinquent contributions to or under a multi-employer plan, if the plan so provides the court may award the plaintiff —
>
> (1) a reasonable attorney's fee and cost of action, and
>
> (2) liquidated damages (not in excess of 20 percent of the delinquency as determined by the court).
>
> Nothing in the preceding sentence shall be construed to limit any remedy permitted under any other provision of Federal or State law.

See H.R. 3904, 96th Cong., § 305 (1980), 126 Cong. Rec. 12,200, 12,221 (1980).[19] The Senate version contained the language that now appears as section 502(g)(2). See S. 1076, 96th Cong., § 306 (1980);[20] *see also* Senate Committee on Labor and Human Resources, 96th Cong., S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 44 (Comm. Print 1980) ("Federal pension law must permit *trustees of plans* to recover delinquent contributions efficaciously.") (emphasis added). Thus, when the bill went to conference committee, the decision was made to eliminate the House provision, which did not specify who could bring "a civil action . . . to collect delinquent contributions." Given this legislative history, we do not believe that Congress wanted beneficiaries to have standing to bring suit on behalf of the plan for delinquent contribution. *See J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 562-63, 101 S.Ct. 1923, 1927-28, 68 L.Ed.2d 442 (1981) (refusing to adopt reading of statute explicitly dropped during conference committee); *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 200, 95 S.Ct. 392, 401, 42 L.Ed.2d 378 (1974) (stating that when a conference committee deletes a

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19. This section was not part of the bill when it was originally introduced in the House and Senate; it apparently was added while the bill was in the House committee.

20. As best we can tell from the legislative history of the Multiemployer Pension Plan Amendments Act of 1980, the language that now appears as section 502(g)(2) of ERISA began as section 308 of Senate bill 1076. See S. 1076, 96th Cong., § 308 (May 3, 1979). By July 24, 1980, however, the Senate had moved the language to section 306. *See* P.L. 96-364, § 306, 94 Stat. at 1295.

provision, "its action strongly militates against a judgment that Congress intended a result that it expressly declined to enact"); *Hussion v. Madigan,* 950 F.2d 1546, 1552 n.7 (11th Cir.1992) (same).

Our holding does not leave beneficiaries without a remedy when the trustees, in breach of their fiduciary duty, unreasonably refuse to sue to recover delinquent contributions. Congress provided that trustees who breach their fiduciary duty "shall be personally liable to make good to [the] plan any losses resulting from each such breach," ERISA § 409(a) (codified at 29 U.S.C. § 1109(a) (1994)), and provided for a cause of action by a beneficiary for such a breach in section 502(a)(2). If the fiduciary is judgment proof or continues to refuse to sue to collect delinquent contributions, the court can order "such . . . equitable or remedial relief . . . including removal . . . of such fiduciary," ERISA § 409(a).

IV.

Count IV of the plaintiffs' complaint is a "claim" against the Record Company Defendants for equitable relief under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3). The district court dismissed Count IV for failure to state a claim for relief, and the plaintiffs challenge its ruling.

Section 502(a)(3) allows a civil action

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable

> relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.[21]

29 U.S.C. § 1132(a)(3).

We need not tarry long in disposing of the plaintiffs' challenge. Even though section 502(a)(3) permits a court to award "appropriate equitable relief," it does so only if the court finds a violation of a substantive provision of ERISA or the terms of a plan. Section 502(a)(3) is not a substantive provision; rather, it simply provides a remedy.

Count IV contains no allegation, within the four corners of that count, that the Record Company Defendants violated a substantive provision of ERISA or the terms of the Funds. To be sure, Count IV incorporates, by reference, all of the 181 paragraphs preceding it. Imbedded in these paragraphs are allegations that the Record Company Defendants failed to carry out their obligations under the Phono Code — specifically, to contribute a percentage of the singers' gross

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21. In Count IV of their complaint, plaintiffs sought three remedies they claim fall under this section: (1) "an accounting of all 'Gross Compensation' rightfully payable to [them] and a determination of the correct amount owed to the Funds"; (2) a declaratory judgment resolving the meaning of "gross compensation" in the Phono Code; and (3) attorney's fees and costs. Citing *Varity Corp. v. Howe*, 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996), the district court dismissed Count IV on the grounds that section 502(a)(3) does not allow these remedies because "Congress has provided plaintiffs with an appropriate remedy and further equitable relief is not mandated." We need not decide that question here.

compensation to the Funds. We would be in serious dereliction of our appellate duty, however, if we allowed this sort of "shotgun pleading" to substitute for, at a bare minimum, an allegation of what law these defendants purportedly broke. *Johnson Enter., Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1333 (11th Cir.1998); *see also Ebrahimi v. City of Huntsville Bd. of Educ.*, 114 F.3d 162, 165 (11th Cir.1997); *Pelletier*, 921 F.2d at 1518. We therefore affirm the district court's dismissal of Count IV.

V.

For the foregoing reasons, the district court's order denying class certification on Counts II, V, VI, and VII, and its judgment dismissing Counts I and IV are affirmed.

AFFIRMED.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 98-8895, 98-9263

District Court Docket No. 93-020358-1-CV

SAMUEL D. MOORE, CURTIS MAYFIELD, et al.,

Plaintiffs-Appellants,

versus

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, AFTRA HEALTH AND RETIREMENT FUND, et al.,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Georgia

Before ANDERSON, Chief Judge, and TJOFLAT and FAY, Circuit Judge.

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and were argued by counsel;

Appendix A

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: June 29, 2000
For the Court: Thomas K. Kahn,
Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: JAN 30 2001

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION DATED JUNE 22, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO.
1:93-cv-2358-CC

SAMUEL D. MOORE, et al., on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, et al.,

Defendants.

ORDER

Pending before the court in the above-styled case are: Plaintiffs' Motion to Amend Interlocutory Order Regarding Class Certification to Include Statement Prescribed by 28 U.S.C. § 1292 [263-1] and Plaintiffs' Motion Pursuant to Fed. R. Civ. P. 54(b) for the Direction of Entry of Judgment on the ERISA Claims against the Record Company Defendants [264-1].

Appendix B

A. Motion to Amend Interlocutory Order

Plaintiffs seek to file an immediate appeal from the court's order denying plaintiffs' motion for class certification. 28 U.S.C. § 1292(b) provides that a district judge may certify an interlocutory order for immediate appeal if the order involves controlling questions of law as to which there is substantial grounds for difference of opinion and an immediate appeal of the order may materially advance the ultimate termination of the litigation. *Harris v. Luckey*, 918 F.2d 888, 892 (11th Cir. 1990). The court finds that the court's order dated January 26, 1998 denying plaintiffs' motion for class certification presents controlling questions of law the resolution of which would materially advance the ultimate termination of this litigation. The court further finds that in the interest of judicial economy it is prudent to resolve the question of whether a class should be certified before incurring the burden of a trial with the individual plaintiffs. Accordingly, plaintiffs' Motion to Amend Interlocutory Order [263-1] is GRANTED, and the court HEREBY AMENDS its January 26, 1998 order to include the following statement:

> This court finds that on the issue of class certification there are controlling questions of law as to which there is a substantial ground for difference of opinion, and an immediate appeal from this order may materially advance the ultimate termination of this litigation.

Appendix B

B. Motion Pursuant to Fed R. Civ. P. 54(b) for the Direction of Entry of Judgment on the ERISA Claims against the Record Company Defendants, or in the Alternative to Amend the Order to Include Statement Prescribed by 28 U.S.C. § 1292(b)

In an order dated August 14, 1997, this court dismissed plaintiffs' ERISA claims against the Record Company Defendants. The court did not dismiss plaintiffs' RICO claims and various common law claims that arose before the effective date of ERISA. Plaintiffs move, pursuant to Fed. R. Civ. P. 54(b) for an order directing entry of judgment as to the ERISA claims against the Record Company Defendants. The Record Company Defendants oppose the entry of final judgment on the ERISA claims, contending that the dismissed ERISA claims are based on the same set of operative facts which form the foundation of the RICO claim. Thus, the Record Company defendants argue, such a comprehensive factual overlap precludes a finding that the ERISA claims are separate from the RICO claims for purposes of Rule 54(b). Fed. R. Civ. P. 54(b) provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the Court may direct the entry of final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Appendix B

Claims are severable when there is a possibility of more than one recovery. *In re Southeast Banking Corp.*, 69 F.3d 1539, 1547 (11th Cir. 1995). The court finds that the ERISA claims are sufficiently distinct from the RICO claims such that there is a possibility of recovery under both statutes. Accordingly, the court finds that there is no just reason for delay of the entry of judgment on the ERISA claims so as to permit an immediate appeal to be taken therefrom, and the court hereby DIRECTS the entry of judgment on the ERISA claims.

CONCLUSION

Plaintiffs' Motion to Amend Interlocutory Order Regarding Class Certification [263-1] is GRANTED. Plaintiffs' Motion Pursuant to Fed. R. Civ. P. 54(b) for Direction of Entry of Judgment on the ERISA Claims against the Record Company Defendants [264-1] is also GRANTED.

SO ORDERED this 22nd day of June, 1998.

s/ Clarence Cooper
CLARENCE COOPER
UNITED STATES DISTRICT
JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION DATED AND FILED JANUARY 26, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO.
1:93-cv-2358-CC

SAMUEL D. MOORE, et al., on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, et al.,

Defendants.

ORDER

Pending before the court in the above-styled case are: Plaintiffs' Amended Motion for Class Certification [154-1] and Plaintiffs' Motion for Class Certification of ERISA Claims against AFTRA Funds [238-1].

I. BACKGROUND

The court's previous orders dated August 2, 1994 and August 14, 1997 adequately detail the relevant factual

background of this case. Briefly summarized, plaintiffs' remaining causes of action are against the Record Company defendants for alleged RICO violations and against the AFTRA Funds and the AFTRA Funds' Trustees for alleged violations of §§ 406, 409, 502(a)(1) and 502(a)(2) of ERISA. Plaintiffs seek class certification of their RICO claim against the Record Company defendants and their ERISA claims against the Funds defendants.

II. DISCUSSION

A. Rule 23 Prerequisites

Fed. R. Civ. P. 23 governs class certification. Pursuant to that rule, a class action may be maintained when: (1) the class is so numerous that joinder of all its members is impracticable, (2) questions of law or fact common to the class are present, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class and (4) the representative plaintiffs will adequately protect the interests of the class. If these requirements are met, the court must also determine whether the facts satisfy one of the prerequisites of Rule 23(b). That subsection provides that classes are appropriate only when (1) the prosecution of separate actions would create a risk of inconsistent verdicts, or where individual adjudications would be dispositive of the interest of class members who are nonparties; or (2) the party opposing the class has acted on grounds generally applicable to the class such that declaratory relief for the class as a whole would be appropriate; or (3) questions of law or fact common to members of the class predominate over issues affecting

individual members such that class adjudication is superior to other methods of litigation for purposes of a fair and efficient resolution of the controversy. The party seeking class certification has the burden of proving the prerequisites. *Gilchrist v. Bolger*, 733 F.2d 1551, 1556 (11th Cir. 1984).

B. ERISA Claims against the Funds defendants

1. *The Benefits Class*

Plaintiffs seek class certification of their claim that the Funds defendants wrongfully determined the participants' eligibility and vesting for retirement pension benefits and wrongfully determined eligibility and vesting for health coverage and life insurance benefits. In determining whether typicality exists, a court must determine whether the class representatives' claims have the same essential characteristics as the claims of other members of the class. *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985). The court must determine if the named representatives' claims have the same essential characteristics as the claims of the other potential class members. In other words, the named representatives must be able to establish the bulk of the elements of each class member's claims when they prove their own claims. *See Spencer v. Central States Pension Fund*, 778 F.Supp. 985, 990 (N.D. Ill. 1991). If defendants' conduct gives rise to the claims of all the class members, and defendants took no action unique to the named plaintiffs, then the claims of the representative plaintiffs are typical of the claims of the class. *Id.*

The court finds that each class member's potential claim for benefits will have to be determined based on individual

facts unique to that class member; therefore, the claims of the named plaintiffs are not typical of the class. The nature of plaintiffs' claims against the Funds defendants will require the court to make a factual inquiry into each class members' recording and earning history before determining whether the Funds defendants' wrongfully denied benefits or failed to properly credit a participant's account. This individual factual inquiry into each participant's history precludes a finding of typicality under Fed. R. Civ. P. 23(a).

Since plaintiffs cannot establish the typicality requirement of Rule 23(a), the court need not reach the Rule 23(b) issue. However, inasmuch as the court has already found that it will be required to make individualized benefits determinations for each class member, the court cannot conclude that common questions of law or fact predominate over issues affecting individual members. Consequently, class adjudication is not the preferable means for the fair and efficient resolution of the issues in this case. *See Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997).

2. The Fiduciary Class

Plaintiffs allege in Counts II, V and VI that the Funds' Trustees breached their fiduciary duty by failing to collect contributions due the Funds and wrongfully settling audits. These causes of actions will require individualized proof similar to that necessary to prove plaintiffs benefits claims and fail to meet the typicality requirement of Rule 23(a).

Furthermore, the fiduciary class fails to satisfy the requirements of Rule 23(b)(1) or 23(b)(2). Specifically, the

court finds that a finding in favor of plaintiffs on their breach of fiduciary duty claims would not be dispositive of the claims of absent class members. Each plaintiff's breach of fiduciary duty claims are individualized such that there is no substantial risk of prejudice to absent class members. *See In re Dennis Greenman Secs. Litigation*, 829 F.2d 1539, 1545 n.8 (11th Cir. 1987). Certification under Rule 23(b)(2) is also not appropriate because the Funds Trustees have not "acted or refused to act on grounds generally applicable to the class." Whether the Funds Trustees acted inappropriately in calculating benefits and pursuing contributions will require a separate determination for each individual plaintiff. The necessity for this individualized inquiry is inconsistent with plaintiffs' argument that the Trustees have acted on grounds applicable to the class as a whole.

For the foregoing reasons, plaintiffs' Motion to Certify ERISA claims against the Funds Defendants is DENIED.

C. The RICO claims against the Record Company Defendants

Plaintiffs RICO claim consists of the allegation that the Record Company defendants, with intent to defraud, sent false statements about each class member through the mail; that each class member relied on misrepresentations made in furtherance of the Record Company defendants scheme to defraud, and that each class member's reliance was reasonable. Plaintiffs do not allege one misrepresentation that affected each of the individual performers, but rather plaintiffs allege numerous separate misrepresentations as to each performer. Thus, to establish mail fraud, each class

member will have to show reliance on defendant's alleged fraudulent conduct. *See Pelletier v. Zweifel*, 921 F.2d 1465, 1499-1500 (11th Cir. 1991). The court finds that the mail fraud allegations can be determined only by a detailed examination of the facts and circumstances surrounding the Record Company defendants' contributions with respect to each performer/artist and are not appropriate for classwide resolution. The court concludes that plaintiffs have failed to satisfy the typicality requirement of Rule 23(a) or the predominance requirement of Rule 23(b). Accordingly, the Motion for Class Certification of the RICO claims is DENIED.

CONCLUSION

Plaintiffs' Amended Motion for Class Certification [154-1] is DENIED. Plaintiffs' Motion for Class Certification of ERISA Claims [238-1] is DENIED. Plaintiffs' Motion to File Brief in Excess of Page Limit [258-1] is GRANTED. Defendant AFTRA's Motion to File Brief in Excess of Page Limit [257-1] is GRANTED.

SO ORDERED this 26th day of January, 1998.

s/ Clarence Cooper
CLARENCE COOPER
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION DATED AND FILED AUGUST 14, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO.
1:93-cv-2358-CC

SAMUEL D. MOORE, et al., on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

AFTRA HEALTH AND
RETIREMENT FUNDS, et al.,

Defendants.

ORDER

Pending before the court in the above-styled case are the following motions: (1) The Funds' Defendants Motion to Dismiss [200-1], (2) The Record Company Defendants' Motion to Dismiss Counts I, IV, VIII and IX of Plaintiffs' Second Amended Complaint [195-1], (3) The Record Company Defendants' Renewed Motion for Summary Judgment [209-1], (4) The Record Company Defendants' Motion for Protective Order [202-1] and (5) Plaintiffs'

Motion to Compel Continuation of Deposition [221-1]. The following motions are GRANTED: The Record Company Defendants Motion for Leave to File Sur-Reply Brief [194-1], Plaintiffs' Motion to File Sur-Reply Memorandum [214-1], Plaintiffs' Motion to Supplement the Record [225-1] and Defendants' Motion to Supplement the Record [232-1].

I. STATEMENT OF FACTS

Plaintiffs are performers, or their legal representatives, on whose behalf numerous record companies are required to make contributions to the American Federation of Television and Radio Artists Health and Retirement Funds (the "Funds") for the benefit of the performers as a result of the production, distribution or marketing of the performers' recordings. The Funds are multi-employer employee benefit plans that provide health and retirement benefits for eligible performers and their dependents. The Funds were established in 1954 to collect required contributions and administer health and retirement benefits for eligible performers. The Funds are jointly administered by a board of twenty trustees.

The Record Company Defendants' responsibility to make contributions to the Funds is set forth in the AFTRA Code of Fair Practice for Phonograph Recordings (the "Phono Code"). The Phono Code requires the Record Company Defendants to make contributions to the Funds based upon compensation paid to the recording artists and to submit reports showing the contributions owed to the Funds and the compensation paid to the recording artists.

In their Amended Complaint, filed on March 1, 1994, plaintiffs asserted causes of action against the Record

Company Defendants based on violations of ERISA, RICO and state law. Each of the causes of action were based on plaintiffs' contention that the Record Company Defendants failed to submit accurate and timely reports and contributions to the Funds. Specifically, plaintiffs alleged that the Record Company Defendants deprived them of benefits due under § 502(a)(1)(B) of ERISA; that the Record Company Defendants breached fiduciary duties under § 502(a)(2).[1] Plaintiffs claimed that the Record Company Defendants participated in the conduct of the Funds' affairs by failing to submit accurate and timely contributions and reports to the Funds. Plaintiffs also alleged state law claims for breach of contract, breach of fiduciary duty and fraud.

In an order dated August 2, 1994, this court allowed plaintiffs' RICO claim to proceed but dismissed plaintiffs' ERISA claims against the Record Company Defendants. The court found that the Record Company Defendants were not "fiduciaries" within the meaning of § 502(a)(2) and that plaintiffs' "equitable" claims for an accounting and injunction were actually an attempt to assert a legal remedy. The court also found that plaintiffs' state law claims were barred by the applicable statute of limitations.

In November 1996, plaintiffs served their Second Amended Complaint on the Record Company Defendants. Count I asserts a derivative cause of action under § 502(g)(2) of ERISA to recover delinquent contributions on behalf of the Funds. Count II asserts a claim against the Funds trustees

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1. Plaintiffs also sought an accounting, an injunction, a declaratory judgment and imposition of a constructive trust under § 502(a)(3).

under ERISA § 502(a)(2) for breach of fiduciary duty, and Count III asserts a claim against the Funds and the Funds trustees under ERISA § 502(a)(1) to recover benefits due. Count IV seeks an accounting of all gross compensation payable to plaintiffs and a declaratory judgment. Count V is brought against Funds trustee Norman Samnick for alleged violations of sections 406(b) and 502(a)(2) of ERISA. Count VI is asserted against the Funds Trustees for alleged violations of sections 409 and 502(a)(2) of ERISA. Count VII reasserts the RICO claim against the Record Company Defendants, and Counts VIII and IX allege, respectively, state law claims for breach of contract and fraud.

II. DISCUSSION

A. The Funds' Defendants' Motion to Dismiss

In the court's August 2, 1994 order, the court dismissed plaintiffs' claims against the Funds for failure to exhaust the Funds administrative remedies. The Funds move to dismiss Counts II, III, and VI of the Second Amended Complaint (asserting claims for benefits and breach of fiduciary duty against the Funds and the Funds' Trustees) on the grounds that the court lacks jurisdiction because plaintiffs have still not exhausted administrative remedies. Plaintiffs argue that the court has jurisdiction because some of the plaintiffs have exhausted administrative remedies, while others have shown that to proceed further with the administrative process would be futile.

Eleventh Circuit precedent requires employees to exhaust administrative remedies before filing a lawsuit for

benefits under ERISA. *Mason v. Continental Group, Inc.*, 763 F.2d 1219, 1227 (11th Cir. 1985). This exhaustion requirement applies to claims for benefits as well as claims for breach of fiduciary duty. An exception to the exhaustion requirement should be recognized in cases where the claims procedures would prove futile. *Curry v. Contract Fabricators, Inc. Profit Sharing Plan*, 891 F.2d 842, 846 (11th Cir. 1990). Upon review of the record and after hearing argument from counsel, the court finds that since the court's August 2 order, plaintiffs have taken numerous steps to comply with the Funds' administrative process.[2] The court appreciates the difficulty of assessing plaintiffs' claims and acknowledges the efforts taken by the Funds' staff to complete the administrative process. The court finds, however, that plaintiffs have attempted in good faith to comply with a process that is almost totally controlled by the Funds. Furthermore, years have passed with no satisfactory resolution of many of the plaintiffs' claims. The court concludes that to proceed any further with the administrative process would be futile.

The court also finds that plaintiffs' have fully exhausted their administrative remedies as to their breach of fiduciary duty claims. The Funds contend that exhaustion requires more than the "conclusory demand" made by plaintiffs for the Trustees to sue themselves. However, since the Funds unequivocally denied plaintiffs' demand, it is not clear what further actions the Funds would require plaintiffs to take, other than to not "ignore" the Funds' "reasonable requests

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2. For example, seven of the plaintiffs have had appeals pending with the Funds for over a year with no resolution. Other plaintiffs' claims have been pending for a significant period of time.

for specificity regarding the bases of claims of fiduciary breach." The court finds that plaintiffs' breach of fiduciary duty claims are properly before this court.

For the foregoing reasons, the Funds' Motion to Dismiss is DENIED.

B. The Record Company Defendants Motion to Dismiss Counts I, IV, VIII and IX of the Second Amended Complaint

The Record Company Defendants argue that Count I should be dismissed because section 502(g)(2) of ERISA does not authorize plaintiffs to bring an action directly against the employers of an ERISA fund. Section 502(g)(2) provides: "In an action by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan. . . ." 29 U.S.C. § 1132(g)(2). The Eleventh Circuit Court of Appeals has determined that ERISA does not authorize an action for damages against non-fiduciaries. *See Useden v. Acker*, 947 F.2d 1563, 1581-82 (11th Cir. 1991).

Plaintiffs contend that the language "for or on behalf of a plan" authorizes a plan participant or beneficiary to act on behalf of a plan; therefore, plaintiffs argue, they are not seeking to expand the remedies that already exist in § 502(g)(2). The court is not persuaded by plaintiffs' argument. The phrase "for or on behalf of" as used in this context refers to fiduciaries bringing an action in a representative capacity. On the contrary, the derivative action plaintiffs seek to incorporate was expressly addressed and

rejected in *Useden*. Moreover, the United States Supreme Court has cautioned federal courts about interfering with ERISA's remedial scheme. *See Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985); *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 254-56, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993). Accordingly, the court concludes that plaintiffs' derivative action under § 502(g)(2) must be DISMISSED.

The Record Company Defendants contend that Count IV should be dismissed because the claims are essentially the same claims that the court dismissed in its August 2, 1994 order. Section 502(a)(3) of ERISA provides that a civil action may be brought "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (I) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3). In the August 2 order, the court found that although plaintiffs drafted the Amended Complaint to characterize their claim as one for equitable relief, it was actually a claim to recover the contributions allegedly due the Funds from the Record Company Defendants.

Plaintiffs contend that their Second Amended Complaint significantly amends the relief sought and that they are only trying to enforce the Plan by articulation of the meaning of the terms contained in the Phono Code. The court finds that the nature of the relief sought by plaintiffs is still legal as opposed to equitable. Furthermore, unlike the situation in *Varity v. Howe*, __ U.S. __, 116 S.Ct. 1065, 134 L.Ed.2d

130 (1996), this is not a case where the relief plaintiffs seek is "appropriate" equitable relief. Congress has provided plaintiffs with an appropriate remedy and further equitable relief is not mandated. *Id.* at 1079.

The Record Company Defendants seek to dismiss Counts VIII and IX of the Second Amended Complaint on the grounds that the claims are barred by the applicable statute of limitations. Plaintiffs contend that the Record Company Defendants failure to provide an accurate accounting of plaintiffs' gross compensation kept the plaintiffs from discovering the Record Company Defendants' fraud, thereby tolling the statute of limitations.

In considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), "the allegations of the complaint and all reasonable inferences from the facts alleged must be taken as true." *Currie v. Cayman Resources Corp.*, 595 F.Supp. 1364, 1370 (N.D.Ga. 1984). In addition, the motion "should be denied unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim." *Bracewell v. Nicholson Air Servs., Inc.*, 680 F.2d 103, 104 (11th Cir. 1982). The court finds that plaintiffs have pled sufficient facts in their Second Amended Complaint to preclude dismissal of the claims under Rule 12(b)(6). Specifically, the court can not conclude at this stage in the proceedings that it appears beyond doubt that plaintiffs will not be able to prove any set of facts in support of their claim that the Record Company Defendants' actions prevented them from discovering the amount of contributions due the Funds.

Appendix D

C. The Record Company Defendants' Renewed Motion for Summary Judgment

Summary judgment is only proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Because the procedure deprives the parties of a trial on the issues, the court must be careful to ensure that only those claims for which there is no need for a factual determination as to any material fact are disposed of by summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In assessing whether the movant is entitled to summary judgment, the court must review the evidence and reasonable factual inferences arising from it in the light most favorable to the nonmoving party. *Welch v. Celotex Corp.*, 931 F.2d 1235, 1237 (11th Cir. 1992). The court must avoid weighing conflicting evidence, and where a reasonable factfinder may "draw more than one inference from the facts, and that inference creates a genuine issue of material fact, the court should not grant summary judgment. *Barfield v. Brierton*, 883 F.2d 923, 933-34 (11th Cir. 1989).

The Record Company Defendants have renewed their motion for summary judgment on plaintiffs' RICO claim, contending that (1) there is no evidence the Record Company Defendants participated in the conduct of the Funds and (2) there is no evidence the Record Company defendants engaged in a pattern of racketeering. Plaintiffs argue that there are genuine issues regarding these issues.

Appendix D

18 U.S.C. § 1962(c) provides that "[it shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprises's affairs through a pattern of racketeering activity or collection of unlawful debt." The United States Supreme Court has held that in order to be liable under § 1962(c), one must participate in the operation or management of the enterprise itself. *Reves v. Ernst & Young*, 507 U.S. 170, 183, 113 S.Ct. 1163, 1172, 122 L.Ed.2d 525 (1993).

Plaintiffs argue that by systematically under reporting performers' "gross compensation," manipulating audits and controlling the information submitted to the Funds, the Record Company Defendants indirectly participated in the process by which the Funds collects money and pays benefits to performers. The Record-Company Defendants argue that their activities were so peripheral to the actual operation of the Funds to extend liability under § 1962(c). "It is not necessary that a RICO defendant participate in the management or operation of the enterprise. On its face, the statute requires only that the defendant 'participate, directly or indirectly in the conduct of the enterprise's affairs. . . .' " *Bank of America v. Touche Ross & Co.*, 782 F.2d 966, 970 (11th Cir. 1986). The court finds that there are numerous questions of fact regarding whether the Record Company Defendants' actions satisfy the "operation and management" test set forth in *Reves v. Ernst & Young*. Specifically, the court finds that the Record Company Defendants' submission of allegedly fraudulent reports directly controlled the Funds' calculation of benefits due plaintiffs and a reasonable jury

could conclude that the Record Company Defendants had a significant degree of control over this vital aspect of the Funds' affairs. *See Aetna Cas. Sur. Co. v. P & B Autobody*, 43 F.3d 1546, 1559 (1st Cir. 1994). Similarly, the court finds that genuine questions of fact exist regarding whether the Record Company Defendants' involvement in the audit process, including the role of Norman Samnick, was sufficient to meet the "operation and management" test of *Reves*.

An act of racketeering, commonly referred to as a "predicate act," includes acts of mail and wire fraud. 18 U.S.C. § 1961(1). A "pattern" of racketeering is established by showing the commission of at least two distinct but related predicate acts. *Sedima v. Imrex Co.*, 473 U.S. 479, 496 n.14, 105 S.Ct. 3275, 3285 n.14, 87 L.Ed.2d 346 (1985). Predicate acts are related if they have similar purposes, results, victims, methods of commission, or are otherwise interrelated. *Id.* at 496. The Record Company Defendants also contend that they are entitled to summary judgment on plaintiffs' RICO claim because there is no evidence in the record that the Record Company Defendants committed mail fraud — the only predicate act alleged by plaintiffs. The court finds sufficient evidence in the record to preclude summary judgment on this issue. There is evidence from which a jury could infer a scheme to defraud, the Funds, plaintiffs or both. Although the Schedule C's were sent directly to the Funds, there is no question that plaintiffs suffered direct injury from any erroneous information contained therein. Consequently, the Record Company Defendants' Motion for Summary Judgment must be DENIED.

Appendix D

D. The Record Company Defendants' Motion for Protective Order

The Record Company Defendants move pursuant to Fed. R. Civ. P. 26(c) for a protective order that certain documents prepared by Norman Samnick are privileged. Norman Samnick is a lawyer who, together with his law firm, has represented several record companies on various matters. Samnick has served as a Funds Trustee since November, 1989. After Mr. Samnick's appointment to the AFTRA Board of Trustees, Samnick continued to represent his record company clients. The Funds invited Samnick to be a Trustee because they wanted someone with his knowledge about the record industry. Samnick contends that he does not participate in any work as a Trustee that is related to the Record Company Defendants' contributions to the Funds or to the provision of health or pension benefits to plan participants.

The documents at issue include various written communications between record companies and Mr. Samnick, made while Mr. Samnick was rendering legal advice to the record companies on issues related to the interpretation of certain provisions of the Phono Code. The documents consist of various memoranda and a summary chart prepared by Mr. Samnick, The court finds that the documents sought by plaintiffs relate to the provision of legal advice and are privileged. For good cause shown, the court GRANTS the Record Company Defendants' Motion for Protective Order.

Appendix D

E. Plaintiffs' Motion to Compel Continuation of Deposition

The deposition of Reed Farrell, President of AFTRA and a Funds Trustee, began on January 10, 1997 in Tucson, Arizona at approximately 12:30 p.m. The deposition was supposed to begin in the morning but was delayed due to flight scheduling problems encountered by plaintiffs counsel. Plaintiffs' counsel advised defendants' counsel prior to the conclusion of the deposition that he would need additional time to complete the deposition; however, attorneys for the Funds defendants concluded the deposition at 4:30 p.m. Plaintiffs move to compel a continuation of the deposition for an additional two hours. The Funds Defendants oppose the motion.

After review of the record, the court finds that the additional expense to be incurred in continuing the deposition for another two hours outweighs the likely benefit of the deposition. The court also finds that the discovery sought is obtainable from other sources and witnesses, some of whom plaintiffs have already deposed. Accordingly, plaintiffs' Motion to Compel the Continuation of Trustee Farrell's Deposition is DENIED.

CONCLUSION

The Record Company Defendants' Motion for Leave to File Sur-Reply Brief [194-1] is GRANTED. Plaintiffs' Motion for Leave to File Sur-Reply Brief [214-1] is GRANTED. Plaintiffs' Motion to Supplement the Record [225-1] is GRANTED. Defendants Motion to Supplement

the Record [232-1] is GRANTED. Plaintiffs' Motion to Compel Continuation of Deposition [221-1] is DENIED. The Record Company Defendants' Motion for Protective Order [202-1] is GRANTED. The Funds Defendants' Motion to Dismiss [200-1] is DENIED. The Record Company Defendants' Motion to Dismiss [195-1] is GRANTED. The Record Company Defendants' Renewed Motion for Summary Judgment [209-1] is DENIED.

SO ORDERED this 14th day of August, 1997.

s/ Clarence Cooper
CLARENCE COOPER
UNITED STATES DISTRICT
JUDGE

APPENDIX E — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JANUARY 5, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 98-8895-JJ, 98-9263-JJ

SAMUEL D. MOORE, CURTIS MAYFIELD, JERRY BUTLER, THOR WILSON, LI-NIE WILSON, individually and as heirs for the benefit of the Estate of Jackie Wilson, Deceased; DAVID PRATER, JR., as an heir for the benefit of the Estate of Dave Prater, Jr., DORIS JACKSON, MARSHALL THOMPSON, CECIL WOMACK, JR., as named beneficiary of Mary Wells, LESTER CHAMBERS, CARL GARDNER, BRIAN HYLAND, WILLIE B. PINKNEY, BARBARA ACKLIN, ALFRED SMITH f.k.a. Brenton Wood, FELIX CAVALIERE,

Plaintiffs-Appellants,

versus

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, AFTRA HEALTH AND RETIREMENT FUND, TED BIRD, J. NICHOLAS COUNTER, III, DEAN FERRIS, CECIL R. FORSTER, JR., et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

Appendix E

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: ANDERSON, Chief Judge, TJOFLAT and FAY, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX F — EXCERPTS FROM SECOND AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO.
93 CV 2358

SAMUEL D. MOORE; CURTIS MAYFIELD; JERRY BUTLER; CARL GARDNER; BRIAN HYLAND; JERRY LANDERS, as administrator on behalf of the ESTATE OF JACKIE WILSON, Deceased; DAVID PRATER, Jr., on behalf of DAVE PRATER, JR.; DORIS JACKSON; MARSHALL THOMPSON; CECIL WOMACK, JR., as named beneficiary of Mary Wells; LESTER CHAMBERS; WILLIE B. PINKNEY; BARBARA ACKLIN; ALFRED SMITH, professionally known as BRENTON WOOD; and OTIS R. HARRIS, JR., a/k/a DAMON HARRIS; for themselves, and for all others similarly situated,

Plaintiffs,

vs.

AFTRA HEALTH AND RETIREMENT FUNDS; JOHN BIRD; JOHN CONNOLLY; J. NICHOLAS COUNTER III, DENNY DELK; REED FARRELL; DEAN FARRIS; JOHN FITZGERALD; CECIL R. FORSTER, JR.; BILL HILLMAN; DAY KROKIK, III; LYNNE LAMBERT; FRANK MAXWELL; JOHN MORAN; MARION PRESTON; GENE RAYBURN; NORMAN SAMNICK; SUSAN SAVAGE; JAMES F. SIRMONS; SALLY STEVENS; BRUCE YORK;

Appendix F

SONY MUSIC ENTERTAINMENT GROUP, and its divisions Columbia Records, Epic Records and Sony Music Distribution; WARNER MUSIC GROUP, INC.; WARNER BROS. RECORDS, INC.; RHINO ENTERTAINMENT COMPANY, d/b/a Rhino Records, Atlantic Recording Corporation, Warner Special Products, Inc., Warner-Elektra-[2] Atlantic Corporation; A&M RECORDS, INC., on its behalf and as assignee and successor to Mercury Recording Productions, Inc., Motown Records, Inc. and Twentieth Century Fox Records, Inc.; BERTELSMANN MUSIC GROUP, INC.; BRUNSWICK RECORDS, INC.; CAPITOL RECORDS, INC., on its own behalf and as assignee and successor to EMI Records USA, Inc., United Artists Records, Inc. and CEMA Distribution; MCA RECORDS, INC., on its own behalf and as assignee and successor of Decca Records, Inc., ABC Paramount Records, Inc., and ABC-Dunhill Records, Inc.; MOTOWN RECORDS COMPANY, L.P., as successor and assignee of Motown Records, Inc.; POLYGRAM RECORDS, INC., on its behalf and as assignee and successor to Twentieth Century Fox Records, Inc. and Motown Records, Inc.; BRUNSWICK RECORDS, INC.; GUSTO RECORDS, INC.; ORIGINAL SOUND RECORD COMPANY, INC.; VEE-JAY INTERNATIONAL, INC.; FANTASY, INC.; and JOHN DOES 1-50,

Defendants.

SECOND AMENDED COMPLAINT

CLASS ACTION
DERIVATIVE ACTION

Appendix F

I. INTRODUCTION

1. Plaintiffs, by their attorneys, bring this class action and derivative complaint pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA") and the Racketeer Influenced and Corrupt Organization Act of 1970 ("RICO"). Plaintiffs base this Second Amended Complaint on personal knowledge, the investigation of counsel, and information derived from their efforts to exhaust administrative remedies.

2. The action is brought derivatively, on behalf of the AFTRA Health and Retirement Funds (herein the "Funds"). The [3] derivative claims are brought pursuant to sections 515 and 502(g)(2) of ERISA (29 U.S.C. §§ 1145 and 1132(g)(2) respectively), for recovery of delinquent contributions against those record companies (the "Record Company Defendants") that were required to make contributions to the Funds for the benefit of Plaintiffs and the Plaintiff Class.

3. Plaintiffs also bring this action directly, on their own behalf and on behalf of a class of persons comprised of all participants in and/or beneficiaries of the Funds, whose status as participants and/or beneficiaries derives in whole or in part from the National Code of Fair Practice for Phonograph Recordings (the "Phono Code") (the "Plaintiff Class"). The class claims set forth in Counts Two, Three, Five and Six are brought against the Funds and/or its Trustees pursuant to sections 502(a)(1) and 502(a)(2) of ERISA, 29 U.S.C. §§ 1132(a)(1) and (a)(2), and seek relief both individually and to the Funds for defendants' failure to enforce

compliance with the mandate of the Phono Code by the Record Company Defendants. The Class claims set forth in Counts Four, Seven, Eight and Nine are brought against the Record Company Defendants pursuant to sections 502(a)(3) of ERISA (29 U.S.C. § 1132(a)(3)), RICO section 1962(c), and state common law, and seek damages and equitable relief for defendants' wrongful conduct.

4. The Phono Code, attached hereto as Exhibit "A," is the collective bargaining agreement between the American Federation of Television and Radio Artists Union (herein "AFTRA" or the "Union") and the Record Company producers of phonograph recordings. [4] The Phono Code, among other things, obligates the Record Company Defendants to make contributions to the Funds on behalf of all performers, as defined therein, including but not limited to plaintiffs, engaged in creating the so-called "Master Recordings" used by the Record Company Defendants to create phonographic records and other entertainment products. The contributions called for by the Phono Code are to be calculated as a percentage of the "Gross Compensation" paid to or on behalf of the performer, on account of the Record Company Defendants' exploitation of the performer's Master Recording, up to a specified amount.

5. Notwithstanding their obligations under the Phono Code and ERISA, the Record Company Defendants have systematically failed to report properly the Gross Compensation of Plaintiffs and the Plaintiff Class and have failed to properly calculate or timely make the contributions to the Funds called for by the Phono Code. Notwithstanding the fact that the Funds and its Trustees knew of the Record Company

Appendix F

Defendants, intentional disregard of their contribution obligations, the Funds and its Trustees acquiesced to corrupt practices which permitted enormous delinquencies to remain outstanding for years, and failed to take any steps to assure that contributions were made by the Record Company Defendants in the correct amounts in a timely manner. This action seeks recovery to the Funds and to plaintiffs for the injury caused by the defendants' wrongful conduct. Plaintiffs also seek equitable relief to prevent defendants' future violations of ERISA and other federal and state laws.

* * *

[78] * * *

COUNT FOUR
Against the Record Company Defendants and the Defendant Class Pursuant to 29 U.S.C. § 1132(a)(3)

182. Plaintiffs and the Plaintiff Class incorporate herein and make a part hereof the allegations contained in paragraphs 1 through 181 above.

183. As set forth more fully above, the Record Company Defendants and the Defendant Class violated their statutory and contractual obligations by, *inter alia*,

a. improperly calculating (if calculating at all) the amount of contributions payable to the Funds on behalf of Plaintiffs and the Plaintiff Class by impermissibly using a "Net Compensation" figure rather than "Gross

Compensation" as the basis for calculating the required contributions to the Funds, in direct violation of the Phono Code;

[79]b. failing to forward delinquent contributions to the Funds upon being notified of a delinquency;

c. deducting those amounts contributed to the Funds on behalf of an artist as against the royalties due and owing to the artist;

d. failing to submit the Schedules A and B and Schedule C's required by the Phono Code;

e. submitting reports on Schedules A and B and Schedule C which incorrectly set forth the plaintiffs' Gross Compensation for the purpose of receiving vesting credit in the AFTRA Health Plan and AFTRA Retirement Plan, and which incorrectly calculated the required contribution;

f. engaging in a multiplicity of commercial transactions regarding the ownership of the rights in the Master Recordings, without ever filing a Schedule D form, as required by the Phono Code;

g. appointing, and retaining in office, certain Trustees, in particular Defendant Samnick, who would advance their interests at the

expense of the interests of the Funds or of the participants/beneficiaries and who would violate the fiduciary duties owed by a Trustee in order to advance their interests;

h. failing to provide complete and accurate statements to Plaintiffs and the Plaintiff Class of the nature and extent of the commercial exploitation of the Master Recordings, which would have given Plaintiffs and the Plaintiff Class an accurate statement of their "Gross Compensation" which would then have allowed them to assess the sufficiency or insufficiency of the contributions to the Funds.

184. The contractual and statutory violations by the Record Company Defendants and the Defendant Class are long-standing [80] and pervasive. These various violations are not unrelated to each other; rather, they are the interlocking elements of a unified scheme to deceive and delude Plaintiffs and the Plaintiff Class in regard to the amount of Gross Compensation properly owning to them and to improperly retain and convert to themselves a substantial portion of the amounts realized from the commercial exploitation of the Master Recordings by failing to remit to Plaintiffs the full amount of Gross Compensation including royalties to which they were entitled, or to contribute to the Funds the full amount of contribution to which they were entitled, based on the amount of Gross Compensation owed to Plaintiffs under their contracts.

185. These breaches by the Record Company Defendants and the Defendant Class of their contractual and statutory duties has caused the loss of pension and health benefits due and owing to Plaintiffs and the Plaintiff Class.

186. Because the Record Company Defendants and the Defendant Class control all information necessary for an accurate calculation of what the Gross Compensation should have been, and because they have systematically and pervasively disseminated inaccurate information in direct violation of their statutory and contractual obligations, Plaintiffs and the Plaintiff Class are unable to obtain the information necessary to make such a calculation from any alternative source.

187. Absent termination of the pervasive, ongoing statutory and contractual violations by the Record Company [81] Defendants and the Defendant Class, there can be no assurance that the proper contributions to the Funds called for by the Phono Code will be made in the future on behalf of the Plaintiffs and the Plaintiff Class.

WHEREFORE, Plaintiffs and the Plaintiff Class request judgment in their favor and against the Record Company Defendants and the Defendant Class as follows:

a. appropriate equitable relief to redress the ongoing failure by the Record Company Defendants and the Defendant Class to comply with contractual and statutory mandates and to enforce the provisions of the Phono Code and the Related Plan Documents, including but not limited to:

i. an accounting of all Gross Compensation rightfully payable to Plaintiffs and the Plaintiff Class and a determination of the correct amount owed to the Funds as a consequence of such amount as is determined; and

ii. a declaratory judgment finally resolving the interpretation disputes surrounding the meaning the term "gross compensation," as used in the 1990-1993 Phono Code and all prior codes

b. Attorneys fees and the costs of this suit; and

c. Such other and further relief as this Court may deem necessary and appropriate.

* * * *

Supreme Court, U.S.
FILED
MAY 25 2001
OFFICE OF THE CLERK

No. 00-1539

IN THE

Supreme Court of the United States

SAMUEL D. MOORE, *et al.*,

Petitioners,

v.

AFTRA HEALTH AND RETIREMENT FUNDS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT AFTRA HEALTH AND RETIREMENT FUNDS TRUSTEES

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QUESTION PRESENTED

The only question presented by Petitioners that is applicable to Respondents AFTRA Health & Retirement Funds Trustees is Petitioners' Question 2. This question should properly be: Was it an abuse of discretion for the district court to deny class certification pursuant to Federal Rule of Civil Procedure 23 with respect to a claim alleging breach of fiduciary duty under Section 502(a)(2) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") where proof of the breach requires highly individualized factual determinations that differed with respect to each of numerous class members?

STATEMENT PURSUANT TO RULE 29.6

Supreme Court Rule 29.6 does not apply to Respondents AFTRA Health & Retirement Funds Trustees because the Trustees are not a nongovernmental corporation.

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STATEMENT OF THE CASE

A. Background

1. The AFTRA Health & Retirement Funds

The AFTRA Health & Retirement Funds (the "Funds") are employee benefit plans within the meaning of ERISA § 1001, *et seq.* The Funds are administered by a Board of Trustees (the "Trustees"), who are fiduciaries of the Funds within the meaning of § 3(21)(A) of ERISA, ten of whom are appointed by the American Federation of Television and Radio Artists ("AFTRA") the collective bargaining representative for most of the Funds' participants, and ten of whom are appointed by employers who are signatories to collective bargaining agreements with AFTRA and who make contributions to the Funds.

2. The Phono Code

Eligibility for benefits under the Funds is based on an individual's "covered earnings," *i.e.*, earnings under an AFTRA Code or collective bargaining agreement requiring contributions to the Funds. The National Code of Fair Practice for Phonographic Recordings (the "Phono Code") is one such collective bargaining agreement. The Phono Code covers vocal recording artists and is signed by record companies who engage those artists.

The Phono Code requires that record company signatories make contributions to the Funds based on a percentage of the earnings paid to individual recording artists by a record company for work covered by the Phono Code, which the Phono Code refers to as "Gross Compensation."

The Funds determine whether an individual artist is eligible for benefits based on the artist's covered earnings in a given year, including "Gross Compensation" as defined by the Phono Code. Thus, both the amount of contributions employers must pay the Funds, and the earnings that should be credited to each artist for purposes of determining eligibility for, and the amount of, benefits under each Fund, depend on the amount of "covered earnings" generated by each artist. What constitutes "covered earnings" (including "Gross Compensation" under the Phono Code) depends on (i) the nature of the work performed by the artist; (ii) for whom the work was performed; (iii) when the work was performed; (iv) where the work was performed; and (v) the amount paid to the artist. Stated differently, both the obligation of an employer to make contributions to the Funds, and an individual participant's eligibility for Funds benefits, are based on the same highly individualized participant compensation arrangements and earnings information.

Adding to this complexity, although the Phono Code requires that contributions to the Funds be made on "Gross Compensation" paid to an artist, it does not define this term. When the Phono Code first was amended in 1959 to require contributions to the Funds, the determination of what constituted "Gross Compensation" was relatively straightforward because artists typically were paid directly by a record company. However, as the method by which record companies compensated artists became more complicated, and payments were frequently not made directly to the artist but rather indirectly through other entities and through more complex arrangements, a multitude of disputes arose between the record companies and the Funds regarding contribution obligations to the Funds.

3. The Funds' Contribution Collection and Audit Procedures

The Funds have had procedures in place to insure that contributing employers make required contributions to the Funds on a regular basis. Specifically, when payments are not received when expected from record companies, the Funds timely demand that payments be made. The Funds routinely consult trade publications and other information sources concerning record sales to confirm that the necessary contributions are made to the Funds.

Finally, the Funds also have an established and comprehensive program for auditing contributing employers, including Phono Code employers, to verify that the proper contributions on earnings have been made, and have hired both inside and outside auditors to assist them in this endeavor. Because an employer's contribution obligations are highly individualized, based on individual artist earnings, the audit process must necessarily focus on the unique earnings of each individual recording artist. Thus, the quintessential characteristic of the Funds' audit process is (i) a particularized examination of contributions made on behalf of each individual artist, as compared to (ii) the covered earnings that the audited record company actually paid to each individual artist during the covered time period. Not surprisingly, audit reports are performer-by-performer analyses of earnings histories. Accordingly, audits are conducted, and settled, on a performer-by-performer basis.

4. The Petitioners' Claims

Petitioners are fifteen present and former artists in the recording industry and the alleged beneficiaries of three deceased

performers. They commenced this action in October 1993 against the Funds, the Funds Trustees, AFTRA, and numerous record company signatories to the Phono Code. The gravamen of all their claims is that the record companies did not make the required contributions to the Funds under the Phono Code based on Petitioners' Gross Compensation under the Phono Code, and that Petitioners were not credited by the Funds with all of their Gross Compensation, thereby adversely affecting their benefits under the Funds. (Petition, at 4, 6). Petitioners sued the Funds for failure to pay the benefits to which they claimed they were entitled, and they sued the Funds Trustees and AFTRA for breach of fiduciary duty for not collecting all of the contributions they believe should have been collected. They also sued the record company respondents for failing to pay those contributions and report the covered earnings. The suit was purportedly brought on behalf of a class of thousands of Funds participants and beneficiaries.

B. The District Court's Denial of Class Certification

Petitioners moved in the district court pursuant to Rule 23 for class certification of their benefits claims against the Funds, fiduciary breach claims against the Funds Trustees, and RICO claims against the record companies. With respect to plaintiffs' fiduciary breach claims, Petitioners do not challenge a single or discrete act or decision of the Trustees, such as making a particular imprudent investment of plan assets, or imprudently retaining a particular insurance carrier. Rather, they seek to litigate numerous highly individualized, fact-specific issues including: (i) the Trustees' alleged failure to collect contributions due from record companies based on the unique earnings of a multitude of artists signed to those record companies; and (ii) the Trustees'

alleged failure prudently to conduct and settle audits intended to ensure that the appropriate contributions were received from record companies with respect to each of their signed recording artists. (Petition, at 6-9).

Applying the standards under Rule 23, the district court denied Petitioners' motions for class certification. With respect to the benefits claims, the court concluded that "each class member's potential claim for benefits will have to be determined based on individual facts unique to that class member" and would "require the court to make a factual inquiry into each class members' recording and earning history before determining whether the Funds defendants wrongfully denied benefits or failed to properly credit a participant's account." (Petition, Appendix C, at 35a-36a). Accordingly, neither the requirements of Rule 23(a) nor Rule 23(b) for class certification were satisfied with respect to Petitioners' benefits claims. Petitioners did not appeal this determination.

The district court also concluded that Petitioners' fiduciary breach claims did not meet the requirements of Rule 23(a) or 23(b). With respect to the requirements of Rule 23(a), the court held that the fiduciary breach claims would "require individualized proof similar to that necessary to prove plaintiffs' benefits claims," and therefore failed to satisfy the typicality requirement. (Petition, Appendix C, at 36a). The court also held that the Petitioners had not met their burden of satisfying the prerequisites of Rule 23(b)(1) for a non-opt out class because it concluded that "a finding in favor of plaintiffs on their breach of fiduciary duty claims would not be dispositive of the claims of absent class members" and, further, that "[e]ach plaintiff's breach of fiduciary duty claims are individualized such that there is no substantial risk of prejudice to absent class members." (Petition, Appendix C, at 37a).

Finally, the district court held that certification of a non-opt out class under Rule 23(b)(2) also was inappropriate because the Trustees had not "acted or refused to act on grounds generally applicable to the class." Fed. R. Civ. P. 23(b)(2). As the district court explained, "[w]hether the Funds Trustees acted inappropriately in calculating benefits and pursuing contributions will require a separate determination for each individual plaintiff. The necessity for this individualized inquiry is inconsistent with plaintiffs' argument that the Trustees have acted on grounds applicable to the class as a whole." (Petition, Appendix C, at 37a).

C. The Eleventh Circuit Decision

Petitioners did not appeal the denial of class certification of their benefits claims. With respect to the fiduciary breach claim, the Eleventh Circuit held that the district court did not abuse its discretion in denying class certification. The court noted that to determine whether the record company defendants owed anything to the Funds, "the district court would have to examine each singer's contract with the record company." (Petition, Appendix A, at 10a). The court pointed out that the district court also would have to consider the impact, if any, of the Trustees' periodic reviews of the record companies' individual statements to the performer concerning his or her earnings, and the effect of these audits on a given record company's contribution to the Funds. (Petition, Appendix A, at 10a-11a). "In sum, each case — those of the named plaintiffs and the putative class members as well — is different: the financial arrangements and the steps the Trustees took to ensure the record companies' compliance with the Phono Code differ." (Petition, Appendix A, at 11a).[1]

1. Petitioners' statement that the lower courts ruled that class certification was denied "because petitioners were pressing claims

(Cont'd)

Based on the foregoing, the Court concluded that it was "doubtful, at the very least," whether Petitioners could satisfy the typicality requirement of Rule 23(a), or any of the conditions of Rule 23(b), and "[h]aving drawn these conclusions, we could hardly say that the district court abused its discretion in refusing to certify a class" with respect to Petitioners' breach of fiduciary duty claims. (Petition, Appendix A, at 11a).

SUMMARY OF ARGUMENT

The determination of whether class certification is appropriate under Federal Rule of Civil Procedure 23 is committed to the discretion of the district court. A plaintiff seeking class certification has the burden of proving that the requirements of both Rule 23(a) and 23(b) have been satisfied. Rule 23(a) requires that before certifying a class the district court must conclude, among other things, that the claims of the named representatives are typical of the claims of absent class members. Courts uniformly have held that this requirement cannot be satisfied where the claims asserted require individualized proof, *i.e.*, proof that differs for each class member. Even if common legal theories or overarching legal issues exist, typicality cannot be satisfied if individualized proof is required to prove the claim, as it is here.

(Cont'd)
for individual relief" (Petition, at 17) is incorrect. The focus of both lower courts properly was on the nature of the proof, not the nature of the relief being sought. As such, the lower courts' decisions were entirely consistent with *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985).

The district court did not abuse its discretion in holding that Petitioners' fiduciary breach claims would require individualized proof because there was ample evidence in the record, as the Eleventh Circuit found, to support this holding. The core of Petitioners' breach of fiduciary duty claim is that the Trustees allegedly failed to collect the required contributions from the record company defendants, and that it was imprudent for the Trustees to settle claims for what plaintiffs believe to be less than what was actually owed to the Funds. The necessary initial inquiry, therefore, must be what contributions actually were owed by the record companies. There is simply no way to determine whether the Trustees failed to insure that contributions actually owed were paid, or that the Trustees imprudently settled contribution claims against the record companies, unless Petitioners first prove, as the initial step in their attempt to prove their claims that additional contributions were in fact due. In this critical respect, this case is different from those ERISA fiduciary breach cases in which the plaintiffs challenge one act, or a discrete number of related acts, that they allege to be a breach of fiduciary duty. Those cases might warrant class treatment precisely because there are no individualized issues. In this case, however, the district court found that determining what contributions are owed to the Funds necessarily requires determination of each individual artist's Gross Compensation under the Phono Code. By its very nature, this initial determination requires individualized proof differing from class member to class member, thereby precluding a finding of typicality necessary for class certification. It was not an abuse of discretion for the district court to reach this conclusion, and its exercise of discretion to deny class certification does not warrant a grant of certiorari.

The necessity for individualized proof also renders inappropriate certification of a non-opt out class under Rule 23(b)(1)(B). There is no risk that a determination of a named plaintiff's actual Gross Compensation, the baseline from which the appropriate amount of contributions to the Funds is determined, will be dispositive of a claim for breach of fiduciary duty based on another class member's gross compensation, precisely because of the highly individualized nature of these determinations. The requirements of Rule 23(b)(1)(B) therefore cannot possibly be satisfied.

Petitioners' principal contention is that the district court erred in concluding that their fiduciary breach claims required individualized proof, and that the court was required to certify a class action because Petitioners' fiduciary breach claims seek recovery on behalf of the Funds, not the individual Petitioners. (Petition, at 19-20). Acceptance of this argument would obviate the application of the standards set forth in Rule 23 in determining whether class certification was appropriate in ERISA breach of fiduciary duty cases. It would require that all such claims be certified as class actions automatically, and without considering Rule 23, simply because relief can only be awarded to the plan. There is absolutely no support for such a contention, and ERISA in fact specifically provides that individual participants can bring fiduciary breach claims. Thus, Petitioners' principal contention is unsupported by, and indeed contrary to, applicable law.

The lower courts simply applied the standards set forth in Rule 23, and recognized that to the extent the Petitioners seek to litigate, on a class-wide basis, the highly individualized issues of what contributions were actually owed to the Funds with respect to the earnings of each

member of the class, their claims would require individualized proof that renders class certification inappropriate. Such a conclusion is not inconsistent with any decision of this Court, any other Court of Appeals, or any established rule of law. It provides no basis for a grant of certiorari.

REASONS FOR DENYING THE WRIT

I. THE ELEVENTH CIRCUIT PROPERLY CONCLUDED THAT THE DISTRICT COURT HAD NOT ABUSED ITS DISCRETION IN CONCLUDING THAT THE TYPICALITY REQUIREMENT OF RULE 23(a) HAD NOT BEEN SATISFIED, AND THAT NO CONDITION OF RULE 23(b) HAD BEEN SATISFIED

District courts have broad discretion whether to certify a class, and their decisions are reviewed under an abuse of discretion standard. *Amchem Prods. v. Windsor*, 521 U.S. 591, 630, 636 (1997) (Breyer, J., concurring in part and dissenting in part); *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982); *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979); *see also Marisol A. v. Giuliani*, 126 F.3d 372, 375 (2d Cir. 1997); *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 136 (3d Cir. 2000); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740, 752 (5th Cir. 1996); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1078-79 (6th Cir. 1996); *Keele v. Wexler*, 149 F.3d 589, 592 (7th Cir. 1998); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1233-34 (9th Cir. 1996); *Hudson v. Delta Air Lines, Inc.*, 90 F.3d 451, 455 (11th Cir. 1996). Under this standard, the conclusion reached by the Eleventh Circuit Court of Appeals that the district court had not abused its discretion in finding that the Rule 23

requirements for class certification had not been satisfied with respect to Petitioners' breach of fiduciary duty claims should not be disturbed.

To satisfy Rule 23(a)'s typicality requirement, "the named representatives must be able to establish the bulk of the elements of each class member's claims when they prove their own claims." *Brooks v. Southern Bell Tel. & Tel. Co.*, 133 F.R.D. 54, 58 (S.D. Fla. 1990); *see also Love v. Turlington*, 733 F.2d 1562, 1563 (11th Cir. 1984). " 'Typicality entails an inquiry whether "the named plaintiff's individual circumstances are markedly different or . . . the legal theories upon which the claims are based differs from that upon which the claims or other class members will perforce be based." ' " *Baby Neal v. Casey*, 43 F.3d 48, 57-58 (3d Cir. 1994) (citations omitted). Typicality requires "that a class representative 'have the incentive to prove all the elements of the cause of action which would be presented by the individual members of the class were they initiating individualized actions.' " *In re NASDAQ Market-Makers Antitrust Litig.*, 172 F.R.D. 119, 126 (S.D.N.Y. 1997) (citations omitted).

Applying this standard, courts have routinely found that Rule 23(a)'s typicality requirement is not satisfied where the claims asserted by the putative class representatives are "grounded in factual situations differing from those of other class members." *Brooks*, 133 F.R.D. at 58. *See, e.g., Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir.) (district court abused its discretion in granting class certification for ERISA breach of fiduciary duty claims because the typicality requirement had not been met when "[e]ach claim, after all, depended on each individual's particular interactions with [the defendant] — and these, as we have said, varied from

person to person"), *cert. denied*, 524 U.S. 923 (1998); *Swoope v. BellSouth Telecomms., Inc.*, Nos. Civ.A. 1:97CV181-D-D, Civ.A. 1:97CV359-D-D, 1998 WL 433952, at *2 (N.D. Miss. June 23, 1998) (denying class certification of ERISA fiduciary breach claims because plaintiffs' claims were not typical of those of absent class members); *Brown v. Utilicorp United, Inc.*, No. 97 Civ. 1277, 1998 WL 166593, at *2-3 (D. Kan. Feb. 24, 1998) (necessity for "individualized proof" precluded finding of typicality under Rule 23(a)).

In this case, there is no dispute that a record company's obligation to make contributions to the Funds is based on each individual artist's covered earnings (or "Gross Compensation" in the terminology of the Phono Code) in a given year. Thus, to prove that the Trustees breached their fiduciary duty under ERISA by not collecting contributions that were due, Petitioners must, at a minimum and as a first step, present evidence of covered earnings that had not previously been reported by the record companies or credited by the Funds. Such a determination can only be made on an artist-by-artist basis, as the lower courts concluded, and is therefore highly individualized.

For example, in order to demonstrate that the Trustees, purportedly in breach of their fiduciary duty, allowed the record company defendants to avoid their contractual and statutory obligations by not collecting required contributions, which they characterized as the "gravamen" of their claims (Petition, at 4), Petitioners would necessarily first have to demonstrate what was, in fact, owed by each record company during a particular period of time for each recording artist signed to that record company and covered by the Funds. This preliminary factual determination is fundamentally

necessary in order then to determine whether earnings reports submitted to the Funds by the record companies were "accurate," and whether additional contributions were in fact "required" with respect to those earnings. Because contribution obligations are determined on a performer-by-performer basis under the Phono Code, Petitioners would have to present evidence of the covered earnings of each artist on whose behalf a claim for earnings is made. Only by analyzing this detailed evidence could a determination be made as to whether the Trustees acted imprudently by not collecting delinquent contributions or in settling contribution claims. (*See* Petition, at 20). The necessity for such individualized determinations precludes a finding of typicality, and this was precisely the conclusion of the courts below. (Petition, Appendix A, at 10a-11a, Appendix C, at 36a-17a).

None of the cases Petitioners cite in support of their argument that their class should be certified involves allegations similar to the individualized nature of the fiduciary breach claims in this case. Rather, each of the cases on which Petitioners rely in which a court certified an ERISA fiduciary breach class involved, without exception, a single or discrete act (or closely related acts) by ERISA plan fiduciaries (such as trustees) occurring at a particular point in time and impacting all potential class members in exactly the same way. *Specialty Cabinets & Fixtures, Inc. v. Am. Equitable Life Insurance Co.*, 140 F.R.D. 474 (S.D. Ga. 1991), most clearly demonstrates this point. That case involved an agreed-upon class that was certified for settlement purposes. Plaintiffs had alleged that the defendants "breached their fiduciary duties by permitting the insurance carrier for the Dimensional Group Trust to be changed to an insolvent insurance carrier." *Id.* at 475. The district court in

that case specifically noted that class certification was appropriate in that case because "only one suit should be brought to remedy *a particular breach* of fiduciary duty." *Id.* at 478 (emphasis added). In contrast, in this case Petitioners do not seek to remedy "a particular breach" of fiduciary duty, but rather seek to have the district court adjudicate thousands of potential fiduciary breach claims occurring over more than a thirty-five year period, which they necessarily must do in order to prove the "systemic abuses" which they allege. (Petition, at 18).

Kane v. United Indep. Union Welfare Fund, No. 97 Civ. 1505, 1998 WL 78985 (E.D. Pa. Feb. 24, 1998), is equally inapposite. In that case, the defendant trustees were accused of engaging in specific discrete prohibited transactions. Specifically, plaintiffs alleged that the trustees had made direct payments to the union, leased fund property to the union, allowed the union to use fund resources, and contracted exclusively with the union as fund administrator, in violation of 29 U.S.C. § 1106 (2000). *Kane*, 1998 WL 78985, at *2, *7. The court held, with little analysis, that the claims were typical because the allegations asserted a common question relating to all fund participants (whether the trustees had engaged in particular transactions with the union that were specifically proscribed by statute), and it was not necessary to examine the prudence exercised by the trustees because the acts themselves were prohibited.

In sharp contrast, in this case Petitioners do not take issue simply with whether or not the Trustees took certain actions, but rather with the manner in which they performed their functions in a vast number of individualized circumstances. Moreover, Petitioners' suggestion that the district court in *Kane* certified plaintiffs' breach of fiduciary

duty claims simply because the claims were asserted in a representative capacity is incorrect. (Petition, at 19). The *Kane* court carefully examined each requirement of Rule 23 and, in its discretion, certified a class for the fiduciary breach claims. Simply alleging that an action is asserted in a representative capacity does not determine whether a class action may be maintained. *See Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 157 (1982).

In short, the Eleventh Circuit properly determined that the district court's decision regarding typicality was within that court's discretion. Given the allegations of the complaint, no class claim for breach of fiduciary duty can be litigated without, in the first instance, presenting individualized proof of the alleged failures to collect the proper amount of contributions. Petitioners' breach of fiduciary duty claims seek to challenge a multitude of individual decisions, a challenge that by its very nature precludes a finding that Petitioners' claims are typical of those of the class. Petitioners may disagree with the district court's conclusion that individualized proof is necessary in order to establish their breach of fiduciary claims asserted in this case. Disagreement with a discretionary determination is not, however, sufficient to establish an abuse of discretion and certainly is no basis for this Court to grant certiorari.

The Eleventh Circuit also held that it was "doubtful" that any of Rule 23(b)'s conditions could be satisfied given the highly individualized nature of the proof that would be required to establish the breach of fiduciary duty claim. (Petition, Appendix A, at 11a). This holding also was well within the discretion afforded to the lower courts in the management of litigation.

Rule 23(b)(1)(B) provides that a case may not be certified as a class action unless the requirements of Rule 23(a) are satisfied *and* prosecution of separate actions by or against individual class members would create a risk of "adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." This Rule is designed to avoid "[t]he difficulties which would be likely to arise if resort were had to separate actions" and to avoid prejudice against the class members themselves. *See* Fed. R. Civ. P. 23(b)(1) Advisory Committee Notes (1966 Amendment). Petitioners argue that a finding in their favor on the fiduciary breach claims would be dispositive of the rights of those not named because they are suing derivatively on behalf of the Funds. (Petition, at 19). Although this might be true in a case such as *Mertens v. Kaiser Steel Retirement Plan*, 744 F. Supp. 917 (N.D. Cal. 1990), *aff'd sub. nom.*, *Mertens v. Black*, 948 F.2d 1105 (9th Cir. 1991), where the plaintiffs challenge a single act (or related acts) as constituting a breach of fiduciary duty, it is not true where, as here, Petitioners challenge a multitude of individual acts.

Moreover, a finding that the Trustees breached their fiduciary duty by failing to collect sufficient contributions from the appropriate record companies with respect to one Petitioner will have no impact on a similar claim brought by any other named or unnamed plaintiff. Indeed, it is precisely because Petitioners' breach of fiduciary duty claims are so individualized that there is no risk of prejudice to absent class members by adjudicating those cases individually. *See In re Dennis Greenman Secs. Litig.*, 829 F.2d 1539, 1545 n.8 (11th Cir. 1987); *Peachin v. Aetna Life Ins. Co.*, No. 92 Civ. 2739, 1996 U.S. Dist. LEXIS 558, at *16 (N.D. Ill. Jan. 16, 1996); *Doe v. Guardian Life Ins. Co.*, 145 F.R.D. 466, 477 (N.D. Ill. 1992).

Petitioners' argument that class certification of the breach of fiduciary duty claims is appropriate under Rule 23(b)(1)(B) solely because they assert "not their own claims for fiduciary breach, but rather the claims of the Funds themselves" (Petition, at 19) was properly rejected by the lower courts. If the district court had accepted plaintiffs' rationale, it would certify as a class action *every* ERISA breach of fiduciary duty claim brought before it since, as Petitioners recognize, all such claims are brought on behalf of a fund. (Petition, at 16). In essence, Petitioners contend that the Rule 23 standards for evaluating the propriety of class certification are inapplicable in ERISA breach of fiduciary duty cases. There is, however, simply no basis in statute or case law for such a proposition.

Finally, if Petitioners are permitted to pursue breach of fiduciary duty claims as a class, which necessarily will involve a determination of the "Gross Compensation" of every class member, there can be little doubt that class certification would itself prejudice absent class members. Individual performers are in the best position to know, and have evidence of, the "Gross Compensation" with which they should be credited. Pursuing claims that require a determination of their Gross Compensation (either for purposes of determining their benefits entitlement or a record company's contribution obligation) without their active participation would certainly prejudice their claims. Petitioners' attempt to certify this aspect of the case as a "mandatory non-opt out" class (Petition, at 20) further exacerbates this prejudice since most of the thousands of absent class members will have no practical choice but to sit by and watch claims related to their own "Gross Compensation" be litigated by those with no familiarity with their personal earnings histories, and no personal stake in

the outcome. If Petitioners press their fiduciary claims on a class basis without offering proof of the "Gross Compensation" of absent class members, the prejudice to absent class members in a non-opt out class will be far worse. Either result is directly at odds with the policies underlying Rule 23.

In sum, the Eleventh Circuit's analysis of these issues was sound, the proper law was applied, and the result was correct. There is, therefore, no basis for granting the petition.

II. THERE ARE NO COMPELLING REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's conclusion that the district court did not abuse its discretion by denying class certification with respect to an ERISA breach of fiduciary duty claim that required individualized proof does not conflict with any relevant decision of this Court. Petitioners make no argument that such a conflict exists. There also is no split of authority on the issue of mandatory class certification of ERISA fiduciary breach claims among the circuit courts of appeal. To the contrary, as explained above, courts uniformly have applied the Rule 23 class certification requirements in ERISA breach of fiduciary duty cases.

In addition, the lower courts did not depart from the "accepted and usual course of judicial proceedings" such that this Court must exercise its supervisory powers. Supreme Court Rule 10(a). To the contrary, the courts below applied the Rule 23 class certification requirements consistent with established precedent of this Court, and the district court properly exercised its discretion to conclude that the existence of individualized issues in this case precluded class certification.

Finally, this case is a particularly weak candidate for review by this Court because Petitioners do not argue that the lower courts applied the wrong rule of law, or misstated the correct rule of law. In fact, the petition ignores this Court's mandate that "careful attention to the requirement of Fed. R. Civ. P. 23 remains . . . indispensible" by giving virtually no attention to the requirements of Rule 23 in the petition. *See Falcon*, 457 U.S. at 157 (quotation omitted). In the end, Petitioners simply take issue with well-reasoned decisions of the lower courts and continue to press their contention that their fiduciary breach claims do not require individualized proof. Such a disagreement with a factual, and entirely discretionary, determination of a district court is not a valid reason for the exercise of this Court's discretion to grant the petition for a writ of certiorari.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

SAMUEL D. MOORE ET AL.,
Petitioners,

VS.

AFTRA HEALTH AND RETIREMENT FUNDS ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The parties to the proceeding are accurately set forth in the petition for a writ of certiorari.

The immediate parent company of respondent Sony Music Entertainment Inc. is Sony Music Holding Inc.; the ultimate parent company is Sony Corporation (Tokyo), whose shares are publicly traded. No other publicly held company owns 10% or more of respondent Sony Music Entertainment Inc.'s stock.

The parent company of respondent Bertelsmann Music Group, Inc. is Bertelsmann, Inc., which in turn is a wholly owned subsidiary of Bertelsmann AG. The shares of Bertelsmann AG are not publicly traded. No publicly held company owns 10% or more of respondent Bertelsmann Music Group, Inc.'s stock.

Respondent Polygram Records, Inc. is now known as UMG Recordings, Inc. Respondents MCA Records, Inc., A&M Records, Inc., and Motown Records, Inc. are divisions of UMG Recordings, Inc. The parent company of UMG Recordings, Inc. is Universal Studios, Inc. The shares of Universal Studios, Inc. are not publicly traded. Universal Studios, Inc. is owned by Vivendi Universal S.A. (92%), a French corporation whose shares are publicly traded, and Matsushita Electric Industrial Co., Ltd. (8%), a Japanese company whose shares are publicly traded. No other publicly held company owns 10% or more of the stock of any of the respondents listed in this paragraph.

The immediate parent company of respondent Capitol Records, Inc. is EMI Group North America Holdings, Inc.; the ultimate parent company is EMI Group PLC. No publicly held company owns 10% or more of respondent Capitol Records, Inc.'s stock.

The ultimate parent company of respondents Warner Music Group Inc., Warner Bros. Records, Inc., and Rhino Entertainment Company is AOL Time Warner Inc. No other publicly held company owns 10% or more of the stock of any of the respondents listed in this paragraph.

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Respondents Capitol Records, Inc., Sony Music Entertainment Inc., MCA Records, Inc., A&M Records, Inc., Motown Records, Inc., Polygram Records, Inc., Bertelsmann Music Group, Inc., Warner Music Group, Inc., Warner Bros. Records, Inc., Rhino Entertainment Company, and their affiliates (referred to below as the "Record Company Defendants") respectfully request that this Court deny the petition for a writ of certiorari in this case.

STATEMENT OF THE CASE

Petitioners are recording artists who are members of the American Federation of Television and Radio Artists ("AFTRA"). Since the 1950s, AFTRA and the Record Company Defendants (or their predecessors) have been parties to the AFTRA Code of Fair Practice for Phonograph Recordings, a collective bargaining agreement known as the "Phono Code." Pet. App. 4a. The Phono Code requires the Record Company Defendants to make contributions to two multi-employer benefit funds on behalf of AFTRA members, based on a percentage of the "gross compensation actually paid" to each recording artist. *Id.* The funds, in turn, provide health and retirement benefits to AFTRA members and their beneficiaries.

The Record Company Defendants send a semi-annual statement to each recording artist detailing the amount of gross compensation paid to the artist during the previous six months. The Phono Code requires the Record Company Defendants to send earnings statements to the funds, reporting the amount of contributions owed to the funds based on the compensation paid to each AFTRA member. Pet. App. 5a. Over time, disputes arose between the trustees of the funds and the Record Company Defendants over the precise meaning of "gross compensation actually paid," a phrase which was not defined in the original version of the Phono Code. *Id.* at 6a.

The dispute centered on the treatment of various production and distribution costs associated with producing and selling records. The Record Company Defendants typically fronted certain costs on behalf of the artists (such as expenses for studio time and accompanying musicians), and then deducted those costs from the royalties paid to the artists. Pet. App. 6a. The Record Company Defendants interpreted the Phono Code to require payment of contributions to the funds based on the amount of royalties actually paid to the recording artists; the trustees of the funds took the position that contributions should be made based on the amount of royalties earned before fronted costs were deducted. *Id.*

The trustees of the funds and the Record Company Defendants attempted to resolve their dispute through negotiations. These negotiations eventually led to an amendment of the Phono Code in 1995 that defined the term "gross compensation" in a manner mutually acceptable to the parties. Pet. App. 7a. During the course of the dispute over the meaning of the Phono Code, the trustees of the funds elected not to pursue litigation seeking to enforce the funds' interpretation of the Code's language. As the Eleventh Circuit noted, sound reasons supported this judgment:

> The record indicates that the Funds Trustees chose not to litigate the issue because (1) the chance that they would prevail was far from clear, and, if they lost the case, the Funds' assets would be depleted, and (2) their periodic audits of the record companies' semi-annual statements to the singers had produced adequate resolutions of the singers' claims that the companies had under-reported gross compensation, and thus the amount of the contribution due the Funds.

Id. at 7a n.8.

Petitioners filed this action in 1993 in an attempt to recover the contributions that they contend the Record Company Defendants underpaid from the 1970s until the Phono Code

was amended in 1995. As relevant here, the Record Company Defendants were named in three counts of the complaint. In count one, petitioners asserted a "derivative" claim on behalf of the funds seeking recovery of the allegedly delinquent contributions under section 502(g)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq. *See* 29 U.S.C. § 1132(g)(2). In count four, petitioners asserted a claim for "appropriate equitable relief" under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). And in count seven, petitioners alleged a violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), pursuant to 18 U.S.C. § 1964(c). Petitioners also asserted several claims against the trustees of the funds, alleging that they breached their fiduciary duties under ERISA when they decided not to sue the Record Company Defendants to collect the allegedly delinquent contributions.

Only a few of the district court's numerous pre-trial rulings are implicated here. The district court granted the Record Company Defendants' motion to dismiss the ERISA counts (counts one and four) pursuant to Federal Rule of Civil Procedure 12(b)(6). Pet. App. 44a-46a. The district court denied petitioners' motion for class certification of the RICO claim against the Record Company Defendants, and denied petitioners' motion for class certification of the breach of fiduciary duty claims against the trustees of the funds. *Id.* at 33a-38a. The RICO and breach of fiduciary duty claims on behalf of the individual named plaintiffs remain pending in the district court, along with various state-law claims not relevant here.

Petitioners asked the district court to enter a partial final judgment on counts one and four pursuant to Federal Rule of Civil Procedure 54(b), so that petitioners could take an immediate appeal from the district court's order dismissing those counts. Pet. App. 31a-32a. Petitioners also sought permission to appeal the district court's interlocutory orders

denying class certification of the RICO and breach of fiduciary duty claims pursuant to 28 U.S.C. § 1292(b). Pet. App. 2a. The Eleventh Circuit consolidated the two appeals and affirmed the district court's rulings in all respects.

REASONS FOR DENYING THE PETITION

I. REVIEW SHOULD BE DENIED ON THE FIRST QUESTION PRESENTED, GIVEN THE LACK OF A CIRCUIT SPLIT AFTER *MERTENS* AND THE INTERLOCUTORY POSTURE OF THE CASE.

The sole basis petitioners assert for review of the first question presented is an alleged conflict between the decision below and decisions of the Second and Third Circuits in *Diduck v. Kaszycki & Sons Contractors, Inc.*, 874 F.2d 912 (2d Cir. 1989), and *Struble v. New Jersey Brewery Employees Welfare Trust Fund*, 732 F.2d 325 (3d Cir. 1984), which held that participants and beneficiaries have standing to bring a claim for delinquent contributions under ERISA. Those cases, however, were decided before this Court's decision in *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993), which rejected the approach to statutory construction employed by *Struble* and *Diduck*. No circuit post-*Mertens* has held that participants and beneficiaries have standing to bring a derivative claim for delinquent contributions against an employer. Thus, in the wake of *Mertens*, there is no indication that the lower courts lack clear guidance on this issue. Moreover, the Second and Third Circuits have not had an opportunity to reexamine their earlier decisions in light of *Mertens*. Review at this juncture would be decidedly premature.

Even if the first question presented warranted review, this case would provide a poor vehicle for resolving the issue petitioners raise. Under petitioners' own construction of the claim, a derivative action for delinquent contributions may be brought only if the plaintiff first establishes that the trustees

of the fund breached their fiduciary duties by failing to file suit against the employer. Whether the trustees of the funds involved in this case are guilty of such a breach is an issue still pending before the district court, and has yet to be resolved. If the district court determines that no breach of fiduciary duty occurred in this case, petitioners' derivative claim will be subject to dismissal on grounds wholly independent of the statutory-construction issue raised in the petition. Thus, at this interlocutory stage of the litigation, petitioners seek review of an issue whose resolution may prove completely unnecessary to the disposition of the case.

A. The Eleventh Circuit Correctly Analyzed the Statutory Text in Light of the Principles Established in *Mertens*.

The Eleventh Circuit declined to follow the lead of the Second and Third Circuits in *Diduck* and *Struble* because it concluded that this Court's intervening decision in *Mertens* had called into doubt the continued validity of those earlier precedents. In *Mertens*, the Court confronted the question whether ERISA permits suits for money damages against a nonfiduciary who knowingly participates in a breach of fiduciary duty. The Court began its analysis by questioning whether the text of ERISA authorized suits against nonfiduciaries at all. The Court noted that, although ERISA contains various provisions imposing obligations upon nonfiduciaries, "no provision explicitly requires them to avoid participation (knowing or unknowing) in a fiduciary's breach of fiduciary duty." 508 U.S. at 254. The Court found it unlikely that this omission was a mere oversight, given the fact that nonfiduciaries could be held liable for knowingly participating in a breach of fiduciary duty under well-established principles of trust law. *Id.* The Court reiterated its "unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did not intend to authorize other remedies that it simply forgot

to incorporate expressly.'" *Id.* (quoting *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985)).

The Court ultimately held in *Mertens* that, even assuming ERISA authorized a cause of action against nonfiduciaries for knowing participation in a fiduciary breach, the statute did not permit recovery of money damages in such suits. 508 U.S. at 255. The plaintiffs argued that this interpretation undermined the basic purpose of ERISA -- protecting plan participants and beneficiaries -- because it left them with less protection than the common law of trusts afforded before ERISA was enacted. The Court rejected this argument, stating that "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration. This is especially true with legislation such as ERISA, an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests -- not all in favor of potential plaintiffs." *Id.* at 261-62 (citation omitted). The Court declined to "adjust the balance between th[e] competing goals [of protecting employees and containing pension costs] that the text adopted by Congress has struck." *Id.* at 263.

The Eleventh Circuit faithfully applied the approach to statutory construction dictated by *Mertens* in construing the ERISA provisions at issue in this case. *See* Pet. App. 15a-24a. Thus, the court of appeals carefully scrutinized the language of ERISA § 502(g), on which petitioners purport to base their derivative claim. That provision provides, in relevant part:

> (1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.
>
> (2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title

> [requiring employers to make contributions as dictated by the terms of the plan] in which a judgment in favor of the plan is awarded, the court shall award the plan --
>
> (A) the unpaid contributions . . . .

29 U.S.C. § 1132(g).

The court below correctly held that the plain language of section 502(g) excludes participants and beneficiaries from the class of persons authorized to bring an action to collect unpaid contributions. Subsection (g)(2) expressly states that an award of unpaid contributions may be made only in an action brought "*by a fiduciary* for or on behalf of a plan." 29 U.S.C. § 1132(g)(2) (emphasis added). The omission of participants and beneficiaries from this provision was not inadvertent, as is evident from an examination of subsection (g)(1). That provision governs "any action" *except* a suit for unpaid contributions, and refers explicitly to participants, beneficiaries, *and* fiduciaries. As this Court has held, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted).

The Eleventh Circuit found support for its interpretation of the text in the statutory history of section 502(g). As the court noted, the House version of the bill that added subsection 502(g)(2) in 1980 would have authorized "any person" to sue to collect delinquent contributions. However, Congress enacted the narrower Senate version of the bill, which expressly limited authority to bring claims for delinquent contributions to fiduciaries alone. Pet. App. 22a-23a. The court below observed that, "[g]iven this legislative history, we do not believe that Congress wanted beneficiaries to have standing to bring suit on behalf of the plan for delinquent contribution[s]." *Id.* at 23a.

Sound reasons support Congress' decision to confer standing solely on fiduciaries in this context. Allowing participants and beneficiaries to bring a derivative action on behalf of the fund when the trustees have determined that such a suit is not in the best interests of the fund would interfere with plan administration and raise the potential for abusive strike suits. The Eleventh Circuit correctly noted that, "[b]y allowing any beneficiary willing to allege a breach of fiduciary duty to bring a derivative suit, the Second and Third Circuits have permitted that beneficiary to substitute his or her judgment for that of the trustees." Pet. App. 21a-22a. To avoid precisely this form of disruption to plan administration, Congress gave plan fiduciaries alone the power to bring suits for delinquent contributions, and granted participants and beneficiaries authority to police their performance through an action for breach of fiduciary duty under ERISA §§ 409 and 502(a)(2). *See* 29 U.S.C. §§ 1109, 1132(a)(2).

B. *Struble* and *Diduck* Are Inconsistent With *Mertens*.

The approach to statutory construction established by the Court in *Mertens* is fundamentally at odds with the approach followed in *Struble* and *Diduck*. In *Struble*, the Third Circuit held that the plaintiffs could assert a derivative claim for delinquent contributions if they first established "that the Trustees . . . breached their fiduciary duties . . . by failing to enforce the Fund's rights to the required amounts of Employer contributions." 732 F.2d at 336-37.* In arriving at

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* *Diduck* reached the same conclusion, although the Second Circuit offered no analysis of its own on this issue. *See* 874 F.2d at 916. The Second Circuit merely relied without comment on its earlier decision in *Alfarone v. Bernie Wolff Constr. Corp.*, 788 F.2d 76, 80 (2d Cir. 1986), and the Third Circuit's decisions in *Struble* and *McMahon v. McDonell*, 794 F.2d 100, 108-11 (3d Cir. 1986). Both *Alfarone* and *McMahon*, in turn, merely cite *Struble* for the proposition that a derivative claim may be

this conclusion, the Third Circuit did not purport to rely upon the text of ERISA (which specifically limits the right to bring an action for unpaid contributions to fiduciaries alone), nor did it analyze the statutory history of section 502(g). Instead, the court relied heavily on general principles of trust law, reasoning that it was proper to infer a derivative claim for delinquent contributions because a similar claim had existed at common law and the claim was generally consistent with ERISA's basic purpose.

Mertens forecloses this nontextual approach to statutory construction under ERISA. As the Court made clear, the fact that a particular cause of action was well established under trust law but nonetheless omitted from the detailed remedial scheme established in ERISA strongly suggests that the omission was deliberate rather than inadvertent. *See* 508 U.S. at 254. In the face of such omissions, courts are not free to "revise the text of the statute" in order to supplement the remedies Congress created. *Id.* at 259. The court in *Struble* did exactly what *Mertens* admonishes courts *not* to do: it substituted "vague notions" of the statute's purpose for "the words of the text regarding the specific issue under consideration," *id.* at 261 (emphasis omitted). The Third Circuit's frank acknowledgment that the only ERISA provision authorizing recovery of delinquent contributions was explicitly limited to plan fiduciaries, *see Struble*, 732 F.2d at 337-38, should have disposed of the plaintiffs' derivative claim without more.

Petitioners' sole argument in defense of the result reached in *Struble* and *Diduck* rests on their contention that "[t]he language of the statute is *not inconsistent with*" the derivative claim for delinquent contributions they advocate. Pet. 13 (emphasis added). The dissent in *Mertens* made a similar argument there, contending that "the statute clearly does not

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maintained under ERISA; neither decision offers any independent analysis to support that conclusion.

bar" a suit against nonfiduciaries. *See Mertens*, 508 U.S. at 265 n.1. The Court's response was blunt and emphatic: "That, of course, is not the issue. The issue is whether the statute affirmatively *authorizes* such a suit." *Id.* at 255 n.5. Here, petitioners concede that section 502(g) does not affirmatively authorize a derivative claim for delinquent contributions. *See* Pet. 13 ("The statute does not address the availability of a derivative action to enforce the rights conferred by the statute."). After *Mertens*, that concession is fatal to the reading of the statute petitioners advance, and simply confirms the fact that *Diduck* and *Struble* are no longer good law.

Since this Court's decision in *Mertens*, no circuit has held that participants and beneficiaries have standing under ERISA to bring a derivative claim for delinquent contributions. Indeed, the circuits have consistently heeded the Court's directive and have refused to create new claims that lack a textual basis in ERISA. *See, e.g., Buckley Dement, Inc. v. Travelers Plan Administrators of Ill., Inc.*, 39 F.3d 784, 789 (7th Cir. 1994); *Reich v. Rowe*, 20 F.3d 25, 30 (1st Cir. 1994). The Second and Third Circuits should be given an opportunity to follow suit and revisit their earlier decisions. Given the fact that only the decision below has analyzed the question presented with the benefit of this Court's teaching in *Mertens*, review at this juncture would be manifestly premature.

C. This Case Provides a Poor Vehicle for Reviewing the Question Presented.

Even if the first question presented warranted review, this case would provide a poor vehicle for resolving the issue petitioners raise here. Under petitioners' own construction of the derivative claim, they must first demonstrate that the trustees of the fund breached their fiduciary duties by not suing to collect the allegedly delinquent contributions. Because of the interlocutory posture of the case, however,

that issue has not been resolved. Petitioners have brought claims for breach of fiduciary duty against the trustees, and those claims (on behalf of the individual named plaintiffs) are still pending before the district court. As petitioners themselves concede, if they do not prevail on their fiduciary breach claims, their derivative claim must be dismissed in any event. *See* Pet. 14 ("Should petitioners fail to establish fiduciary breach under Section 502(a)(2), the derivative suit would fail as well.")

Thus, petitioners seek review of an issue that, depending on rulings the district court has yet to make, may not need to be addressed in order to dispose of this litigation. For example, if the district court ultimately grants summary judgment for the trustees on the issue of fiduciary breach, any ruling by this Court on the existence of a derivative claim under ERISA will amount to little more than an advisory opinion. The Court has traditionally declined to expend its scarce resources reviewing issues raised at an interlocutory stage whose resolution may be rendered unnecessary by further proceedings in the lower courts. *See, e.g., Brotherhood of Locomotive Firemen and Enginemen v. Bangor & A. R. Co.*, 389 U.S. 327, 328 (1967) (*per curiam*). There is good reason to believe that resolution of the derivative-claim issue will prove unnecessary here. *See* Pet. App. 7a n.8 (suggesting that, in Eleventh Circuit's view, trustees are likely to prevail on breach of fiduciary duty claims).

II. THE THIRD QUESTION PRESENTED, INVOLVING DISMISSAL OF PETITIONERS' CLAIM UNDER ERISA § 502(A)(3), IS FACTBOUND AND MERITLESS.

The district court dismissed count four of petitioners' complaint, which asserted a claim for "appropriate equitable relief" under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), for failure to state a claim on which relief could be granted. Pet. App. 45a-46a. The court of appeals affirmed the district

court's ruling on a different ground relating to a pleading deficiency. *Id.* at 25a-26a. Petitioners simply contend that both courts erred in ruling as they did. At best, petitioners seek nothing more than factbound error correction, and review is therefore unwarranted.

Petitioners contend that the district court erred in applying *Varity Corp. v. Howe*, 516 U.S. 489 (1996), to the facts of this case. In *Varity*, the Court held that ERISA's "catchall" remedial provision, ERISA § 502(a)(3), does not afford relief when Congress has provided an adequate remedy for a beneficiary's injuries under other provisions. 516 U.S. at 515. Petitioners contended below, as they do here, that they are entitled to relief under section 502(a)(3) because dismissal of their derivative claim leaves them with no remedy for the Record Company Defendants' alleged failure to make the required contributions to the funds. The district court squarely rejected this contention: "[U]nlike the situation in [*Varity*], this is not a case where the relief plaintiffs seek is 'appropriate' equitable relief. Congress has provided plaintiffs with an appropriate remedy and further equitable relief is not mandated." Pet. App. 45a-46a.

That conclusion is undoubtedly correct. As the Eleventh Circuit noted, dismissal of petitioners' derivative claim does not leave them without a remedy, since petitioners can obtain full recovery from the trustees in the event that they prove the trustees breached their fiduciary duties by not attempting to collect the allegedly delinquent contributions. *Id.* at 24a. ERISA § 409(a) expressly provides that trustees who breach their fiduciary duties "shall be personally liable to make good to [the] plan any losses to the plan resulting from each such breach." 29 U.S.C. § 1109(a). And section 502(a)(2) provides participants and beneficiaries with a cause of action to enforce the provisions of section 409(a). *See* 29 U.S.C. § 1132(a)(2). Thus, petitioners are simply wrong when they assert that dismissal of their section 502(a)(3) claim leaves them "with no remedy under ERISA at all." Pet. 22. In view

of the fact that Congress has provided petitioners with an adequate remedy under ERISA § 502(a)(2), the district court correctly held that *Varity* was inapposite here.

In any event, the Eleventh Circuit found it unnecessary to reach the issue addressed by the district court because it concluded that count four had to be dismissed for pleading deficiencies. Pet. App. 25a-26a. The court of appeals noted that petitioners' complaint resembled the "shotgun" pleading condemned in a number of its earlier decisions: the complaint was 96 pages long, contained 232 numbered paragraphs, and was drafted so that each count incorporated by reference all previous paragraphs. *Id.* at 8a. The court affirmed the dismissal of count four because it contained no allegation that "the Record Company Defendants violated a substantive provision of ERISA or the terms of the Funds." *Id.* at 25a. The court concluded that "[w]e would be in serious dereliction of our appellate duty . . . if we allowed this sort of 'shotgun pleading' to substitute for, at a bare minimum, an allegation of what law these defendants purportedly broke." *Id.* at 26a.

Contrary to petitioners' contention, the Eleventh Circuit did not "creat[e] a pleading standard at variance with established law." Pet. 24. The court of appeals merely applied well-settled Eleventh Circuit precedent, which had previously held "shotgun" pleadings subject to dismissal for failure to state a claim, *see, e.g., Pelletier v. Zweifel*, 921 F.2d 1465, 1518-19 (11th Cir. 1991), to the facts of this case. Petitioners do not raise any issue of general importance here; they merely complain about a ruling that is of consequence only to the parties involved in this case. Review should be denied.

III. THE RICO ISSUE RAISED BY PETITIONERS WAS NOT ADDRESSED BY THE DECISION BELOW.

In the district court, petitioners moved unsuccessfully for class certification of their RICO claim against the Record

Company Defendants pursuant to Federal Rule of Civil Procedure 23. Petitioners based their RICO claim on predicate acts of alleged mail fraud. Petitioners seek review in this Court of the question whether the reliance element of the mail-fraud scheme they allege may be established on a class-wide basis. The Eleventh Circuit never addressed this issue, however, because it affirmed the denial of class certification on an entirely independent ground. Thus, the question on which petitioners seek review is simply not raised by the decision below.

The heart of petitioners' RICO claim is their contention that the earnings statements mailed by the Record Company Defendants to the funds contained false statements regarding the amount of compensation earned by each recording artist. *See* Pet. App. 12a. The district court denied petitioners' motion for class certification of the RICO claim because it concluded that "the mail fraud allegations can be determined only by a detailed examination of the facts and circumstances surrounding the Record Company defendants' contributions with respect to each performer/artist and are not appropriate for classwide resolution." *Id.* at 38a. Petitioners note that, in denying their motion for class certification, the district court also stated that, "to establish mail fraud, each class member will have to show reliance on defendant's alleged fraudulent conduct." *Id.* at 37a-38a. Based on that single passage from the district court's order denying class certification, petitioners argue that review should be granted to decide whether they must prove individual reliance on the earnings statements mailed to them, or whether it is sufficient that the funds relied on those statements when determining the level of benefits owed.

The court of appeals never addressed this issue. It began with the assumption that each element of petitioners' RICO claim had been established, including reliance. Pet. App. 13a. But the court concluded that most of the questions of fact raised by petitioners' RICO claim were not common to the

class. In particular, the court held that petitioners could not establish the alleged falsity of the representations contained in the earnings statements absent a detailed examination of each individual contract between a recording artist and the record company involved.

> Because the singers' contracts with the record companies were not identical -- in terms of the royalties to be paid the singers and the parties' allocation of expenses -- only by undertaking such examination could the court know what expenses the record company fronted the singer and thus the expenses that should or should not have been included as gross compensation in the company's semi-annual statement.

Id. at 10a; *see also id.* at 13a. The Eleventh Circuit correctly concluded that, "[f]or a court to determine which statements contained errors would be a monumental task that could not reasonably be undertaken in one lawsuit." *Id.* at 13a-14a. For this reason -- having nothing to do with the reliance element of mail fraud -- the court of appeals held that "common questions of law and fact do not predominate over individual issues," as required under Rule 23(b)(3). *Id.* at 14a.

Petitioners do not contest the correctness of the Eleventh Circuit's ruling that the alleged *falsity of the earnings statements* could not be established on a class-wide basis. The issue petitioners raise here relating to proof of reliance was not the basis on which the court of appeals affirmed the district court's denial of class certification. Because the decision below does not address the question presented in the petition, review should be denied. *See Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988) (this Court ordinarily declines to consider questions presented in petition for certiorari that were not addressed by court of appeals).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

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